DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-11311
Title: Marcus Sykes, Petitioner
v.
United States
Docketed: June 11, 2010
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (08-3624)
Decision Date: March 12, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 9 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 12, 2010)
Jul 8 2010	Order extending time to file response to petition to and including August 11, 2010.
Aug 9 2010	Brief of respondent United States in opposition filed.
Aug 18 2010	Reply of petitioner Marcus Sykes filed. (Distributed)
Aug 19 2010	DISTRIBUTED for Conference of September 27, 2010.
Sep 28 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 8 2010	SET FOR ARGUMENT ON Wednesday, January 12, 2011.
Nov 12 2010	Brief of petitioner Marcus Sykes filed.
Nov 12 2010	Joint appendix filed. (Statement of costs filed)
Nov 12 2010	Motion to file volume II of the joint appendix under seal filed by petitioner Marcus Sykes.
Nov 19 2010	CIRCULATED.
Dec 1 2010	Motion DISTRIBUTED for Conference of January 7, 2011.
Dec 7 2010	Record from U.S.C.A. for Seventh Circuit is electronic.
Dec 7 2010	Record from U.S.D.C. for Southern District of Indiana is electronic.
Dec 13 2010	Brief of respondent United States filed. (Distributed)
Jan 5 2011	Reply of petitioner Marcus Sykes filed. (Distributed)
Jan 7 2011	Motion to file volume II of the joint appendix under seal GRANTED.
Jan 12 2011	Argued. For petitioner: William E. Marsh, Indianpolis, Ind. For respondent: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

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PETITION FOR WRIT OF CERTIORARI

No. _____

SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES

The caption of the case contains the names of all of the parties.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit whose judgment is sought to be reviewed is reported at *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010) and is reprinted in the appendix to this petition at A-1.

JURISDICTION

The decision of the court of appeals was entered on March 12, 2010; the opinion was amended on March 22, 2010.

This Court has jurisdiction under 28 U.S.C. § 1254.

This case involves the interpretation of 18 U.S.C. § 924(e)(2)(B) and I.C. 35-44-3-3(a)(3) and (b)(1)(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)

"(2) As used in this subsection–

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–

(i) has as an element the use, attempted use or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;"

"A person who knowingly or intentionally:

* * *

"(a)(3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

* * *

"(b) The offense under subsection (a) is a:

(1) Class D felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

STATEMENT OF THE CASE

Marcus Sykes pled guilty to an indictment which charged him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court had jurisdiction of the case pursuant to 28 U.S.C. § 3231.

This offense is punishable by a prison sentence of not more than 10 years in prison, unless the defendant has three previous convictions for a "violent felony" or drug trafficking offense in which case the sentence mandated by Congress in the Armed Career Criminal Act, 18 U.S.C. § 924(e), is 15 years to life in prison.

The district court denied Mr. Sykes' objection to the enhancement, held that he had three previous convictions for a "violent felony" and sentenced him to 188 months in prison. Mr. Sykes' objection was that the enhancement did not apply to him because his previous Indiana state conviction for using a vehicle while knowingly or intentionally fleeing from a law enforcement in violation of I.C. 35-44-3-3 was not a "violent felony."

The United States Court of Appeals for the Seventh Circuit affirmed the application of the enhancement to Mr. Sykes and his sentence of 188 months in prison.

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals that using a vehicle to flee a police officer is a "violent felony" under 18 U.S.C. § 924(e) is in direct conflict with *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009) and *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008).

The court of appeals opinion in *Sykes* acknowledges the conflict with *Harrison*. Referring to *Harrison*, the seventh circuit said, "[w]e simply reached different conclusions." The court of appeals decision in *Sykes* followed its holding in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), an opinion the eleventh circuit explicitly declined to follow in *Harrison*; the court in *Harrison* said, "it appears that we are at odds with all but one other circuit that has addressed this issue [citing *Spells* and other cases]." 558 F.3d at 1296. It is clear that the opinions of the seventh and eleventh circuits are in direct conflict and both have declined to follow the precedent from the other.

In *Jennings* the ninth circuit held that a Washington fleeing statute which is indistinguishable from the Indiana fleeing statute is not a "violent felony" under § 924(e). The court in *Jennings* held that proof of an actual or potential risk of harm to others is an element of generic felony fleeing and since the Washington statute did not include that element it is not a "violent felony."

The court of appeals decision is *Sykes* also conflicts with *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009) which held that fleeing a police officer in a motor vehicle is not a "crime of violence" under the United States Sentencing Guidelines, U.S.S.G. § 4B1.1. The court in *Tyler* recognized that the "definitions of 'violent felony' [18 U.S.C. § 924(e)] and 'crime of violence' [U.S.S.G. § 4B1.1] are virtually identical." *Id.* at 725 n3.

This petition presents an important issue which has split the circuit courts and which this court should resolve. The circuit split means that some defendants, such as Mr. Sykes, receive sentences of 15 years to life in prison while other persons charged with the same crime and with identical criminal histories receive a maximum

sentence of 10 years in prison. The definition of "violent felony" or "crime of violence" also affects the sentencing guideline calculation in other circumstances.[1]

This Courts' opinions interpreting the 18 U.S.C. § 924(e) term "violent felony" in *James v. United States*, 550 U.S. 192 (2007), *Begay v. United States*, 553 U.S. 137 (2008), and *United States v. Chambers*, 555 U.S. ----, 129 S.Ct. 687 (2009), have resulted in a numerous circuit splits. In his concurring opinion in *Chambers*, Justice Alito said, "the 'categorical approach' to predicate offenses has created numerous splits among the lower federal courts." 129 S.Ct. at 694.

The crime of using a vehicle while knowingly or intentionally fleeing from a law enforcement officer does not have "as an element the use, attempted use, or threatened use of physical force against the person of another" and it is not one of the enumerated felonies in the second clause of the § 924(e), so it is a "violent felony" only if it

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[1] See, e.g., firearms offenses U.S.S.G. § 2K2.1(a).

"otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e).

The conclusion that a crime "presents a serious potential risk of physical injury to another" is not enough to bring it within the residual clause of § 924(e). This Court held in *Begay* that driving under the influence of alcohol created a serious potential risk of physical injury to another, but was not a "violent felony." 553 U.S. 141. In addition the crime must be similar to the enumerated offenses, burglary, arson, extortion and the use of explosives. The Court held that an offense is similar to the enumerated offenses if it involves "purposeful, violent, and aggressive conduct" because this is conduct which "makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." 553 U.S. at 144-5.

The eighth, ninth, and eleventh circuits have more faithfully applied these principles in interpreting the residual clause than the seventh circuit. *Begay* follows *Taylor v. United States*, 495 U.S. 575 (1990) in holding that the Court must "consider the offense

generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." 553 U.S. at 141.

In *Harrison*, the eleventh circuit described the elements of the generic fleeing offense: "[t]he behavior ordinarily underlying the crime in § 316.1935(2) involves only this conduct: (1) a law enforcement vehicle, with its siren and lights activated, signals the motorist to stop and (2) the motorist willfully refuses or fails to stop the vehicle." 553 F.3d. at 1293.

Viewed this way it seems untenable to label the behavior generically described by the Indiana statute Mr. Sykes was convicted of violating as "purposeful, violent and aggressive." The seventh circuit did not consider the offense generically, but rather made some assumptions about the kind of conduct which violates the statute and the probable consequences of that conduct. The court envisions the offense as "daring a cop to endanger himself by giving chase" and "something that is inherently likely to lead to violent confrontation," [598 F.3d at 336].

The Indiana Court of Appeals upheld the felony conviction under I.C. 35-44-3-3(a)(3) and (b)(1)(A) of a woman who drove for 10 to 15 seconds before stopping after a man being chased by police jumped in her car. *Swain v. State*, 923 N.E. 2d 32 (Ind. App. 2010)(Table); 2010 WL 623720.

The seventh circuit opinion in *Sykes* focuses exclusively on the question of whether the conduct was "purposeful" and does not address the questions of whether the conduct was "violent" and "aggressive." The only consideration the court of appeals gave to the question of whether the conduct was "violent" was resolved by reverting to the requisite "mental culpability," an aspect of the conduct more properly considered "purposeful," not "violent." 598 F.3d at 337.

The Oxford English Dictionary defines "violent actions" as "characterized by the doing of harm or injury; accompanied by the exercise of violence," and defines "violence" as "the exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or

usage tending to cause bodily injury or forcibly interfering with personal freedom." Using a vehicle while fleeing a law enforcement officer is not "violent" under this definition.

In *Harrison*, the eleventh circuit concluded:

> "[h]owever, disobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes. Or as the Supreme Court put it in Begay, such conduct does not 'show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. Begay, 128 S.Ct. at 1587. It is not "the deliberate kind of behavior associated with violent criminal use of firearms." Id. It is not the type of conduct that one hears about and remarks, "that's the kind of thing an armed career criminal would do." See id. at 1586 ("[S]uch crimes are characteristic of the armed career criminal, the eponym of the statute." (quotation marks omitted))." 558 F.3d 1280, 1295 (11th Cir. 2009).

The Indiana fleeing statute has a separate provision for using a vehicle to flee from a police officer in a manner that creates a substantial risk of bodily injury to another person. I.C. 35-44-3-3(b)(1)(B). Mr. Sykes' previous conviction was under the subpart (A) of this statute, using a vehicle to flee a police officer, and not subpart (B) fleeing in a vehicle in a manner "creating a substantial

risk of bodily injury to another person." This distinction in the statute emphasizes that the statute under which Mr. Sykes was convicted does not necessarily define the kind of dangerous behavior contemplated by the seventh circuit because that behavior is covered by a separate statute. Conduct which constitutes "daring a cop to endanger himself by giving chase," and "something that is inherently likely to lead to violent confrontation," [598 F.3d at 336] is addressed by I.C. 35-44-3-3 (b)(1)(B), not the statute of Mr. Sykes' conviction, I.C. 35-44-3-3 (b)(1)(A). The statute under which Mr. Sykes was convicted also applies to more innocuous conduct such as "a fleeing coward-not an armed career criminal bent on inflicting physical injury" [*Harrison*, 558 F.3d at 1295] or a frightened girlfriend as in *Swain v. State*, 923 N.E. 2d 32 (Ind. App. 2010)(Table); 2010 WL 623720.

Begay and *Chambers* relied heavily on objective data in comparing the risk presented by the offense before the Court to the enumerated offenses. The government did not provide the court of appeals any objective data which led the court to make it's

unsupported assumptions and conclusions about the nature of the crime for which Mr. Sykes was convicted.

The court of appeals in *Sykes* considered the issue as essentially whether to follow or overrule *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), a decision of the seventh circuit before *Chambers v. United States*, 555 U.S. ----, 129 S.Ct. 687 (2009); in *Chambers* this Court reversed a seventh circuit interpretation of "violent felony" under the residual clause of 18 U.S.C. § 924(e).

The court of appeals in *Sykes* said, "the Fifth, Sixth and Tenth Circuits have all agreed with our reasoning in *Spells*. See *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir.2009); *United States v. Young*, 580 F.3d 373, 378 (6th Cir. 2009); *United States v. West*, 550 F.3d 952, 971 (10th Cir. 2008)." In *Harrimon*, the fifth circuit considered a state statute virtually identical to the Indiana statute, but the sixth and tenth circuit decisions cited by the court of appeals are distinguishable from *Sykes* because the state statute being considered had an additional element.

The Utah statute considered by the tenth circuit required operating the vehicle "so as to interfere with or endanger the operation of any vehicle or person." *United States v. West*, 550 F.3d 952, 961 (10 th Cir. 2008). The Michigan statute considered by the sixth circuit included as an element "increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police." *United States v. Young*, 580 F.3d 373, 376 (6th Cir. 2009). Violation of the Michigan statute was a misdemeanor which became a felony only for a second offense within five years of the first.

These statutes are similar to the Wisconsin fleeing statute which has also been held to be a "violent felony" by the seventh circuit. *United States v. Partee*, — F.3d —, 2010 WL 1141187 (7th Cir. 2010). The Wisconsin crime is defined as "willfully and wantonly disregarding the officer's signal so that one endangers the police, pedestrians, or other vehicles; or by speeding away in the vehicle or extinguishing its lights." *Id.* at 1. The *Partee* opinion applies to three cases which were consolidated by the seventh circuit because they all

raise the same issue. Counsel for these defendants have advised counsel for Mr. Sykes that they intend to petition this Court for certiorari in each of those cases.

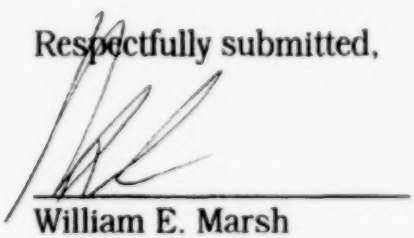
The Indiana statute is narrower than the Wisconsin, Michigan, or Utah statutes because it does not include an element of creating a risk of injury or a dangerous situation and may therefore be a better vehicle for this court to resolve the split in the circuits.

CONCLUSION

The petitioner respectfully requests that a writ of certiorari be granted.

Date: June 9, 2010

Respectfully submitted,



William E. Marsh

THE SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United State Court of Appeals for the Seventh Circuit

APPENDIX

OPPOSITION BRIEF

No. 09-11311

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 09-11311

MARCUS SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 598 F.3d 334.

JURISDICTION

The judgment of the court of appeals as amended was entered on March 22, 2010. The petition for a writ of certiorari was filed on June 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Indiana, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A9.

1. On March 11, 2008, petitioner brandished a firearm while attempting to rob two people who were sitting in a parked car outside of a liquor store in Indianapolis, Indiana. Petitioner recognized one of the people in the vehicle and aborted his robbery attempt. Police officers subsequently saw petitioner toss a black revolver on the ground, and they arrested him. Pet. App. A4; Presentence Report (PSR) paras. 8-10.

On July 22, 2008, petitioner pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). Pet. App. A4. On that count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

At the sentencing hearing, petitioner did not dispute that two of his prior convictions under Indiana law for robbery qualified as "violent felon[ies]" for ACCA purposes. See Pet. C.A. Br. 3 & n.1; PSR paras. 23, 38. Petitioner did dispute, however, whether a third prior conviction qualified as an ACCA violent felony: his conviction in June 2003 under Indiana Code § 35-44-3-3(b)(1) for intentional vehicular flight from a law enforcement officer. PSR para. 39.[1] The district court concluded that petitioner's prior conviction for intentional vehicular flight was a violent felony, which meant that petitioner's advisory Guidelines range was 188 to 235 months of imprisonment (based on his criminal history category of VI and his total offense level of 31). Id. paras. 27, 43, 74.

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[1] According to the PSR, on May 30, 2002, police attempted to stop petitioner, who fled in a motor vehicle. Petitioner led police on a chase, during which he drove on the wrong side of the road and through the yards of two residences before striking the rear of a third residence with his vehicle. There were people standing in those yards during the chase. PSR para. 39.

The district court sentenced petitioner to a term of 188 months of imprisonment. Pet. App. A4.

2. The court of appeals affirmed. Pet. App. A1-A9. It held, in reliance on its earlier decision in United States v. Spells, 537 F.3d 743, 752 (2008), cert. denied, 129 S. Ct. 2379 (2009), that "resisting law enforcement in a vehicle under Indiana law typically involves conduct that is 'purposeful, violent[,] and aggressive' such that there is an increased likelihood that the 'offender is the kind of person who would deliberately point [a] gun and pull the trigger.'" Pet. App. A5 (quoting Spells, 537 F.3d at 751-752, and Begay v. United States, 553 U.S. 137, 146 (2008)) (second brackets in original); id. at A6 ("[R]esisting law enforcement and the enumerated crimes [in the ACCA] all create a likelihood of violent confrontation and are purposeful, violent and aggressive.") (internal quotations marks omitted).

ARGUMENT

Petitioner contends (Pet. 5-15) that his prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is not a "violent felony" under the ACCA and that the decision below is inconsistent with this Court's decisions in Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 129 S. Ct. 687 (2009), as well as with decisions of the Eighth, Ninth, and Eleventh Circuits. Those contentions are without merit. Petitioner's vehicular flight

conviction is significantly different in kind and degree from the driving-under-the-influence conviction at issue in Begay and the failure-to-report conviction at issue in Chambers. Moreover, there is no conflict in the courts of appeals on the question presented. The Court has declined to review this question several times, and the same disposition is appropriate here.

1. a. In Begay, this Court held that felony driving under the influence (DUI) does not qualify as a violent felony under the ACCA. The Court reasoned that, to qualify as a violent felony under the ACCA's residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives, and thus must "typically involve purposeful, violent, and aggressive conduct." Begay, 553 U.S. at 142-145 (internal quotation marks omitted). The Court held that the DUI offense at issue did not satisfy that definition because, even assuming that DUI "presents a serious potential risk of physical injury to another," it is a "strict liability" offense that "typically" does not involve "purposeful" conduct. Id. at 144-146.

The decision below is consistent with Begay. Unlike drunk driving, vehicular flight from a law enforcement officer involves purposeful, violent, and aggressive conduct. As an initial matter, vehicular flight from police is purposeful conduct because the

Indiana statute provides that the flight must be done "knowingly or intentionally." Ind. Code § 35-44-3-3(a); see United States v. Harrimon, 568 F.3d 531, 534 (5th Cir.) ("[U]nlike the DUI statute at issue in Begay, fleeing by vehicle requires intentional conduct."), cert. denied, 130 S. Ct. 1015 (2009). And because vehicular flight "calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit," it is an inherently violent and aggressive crime. United States v. Spells, 537 F.3d 743, 752 (7th Cir. 2008), cert. denied, 129 S. Ct. 2379 (2009). Vehicular flight "'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence." Harrimon, 568 F.3d at 535 (quoting United States v. West, 550 F.3d 952, 970 (10th Cir. 2008)).

An offender's "willingness to use a vehicle to flout an officer's lawful order to stop" also demonstrates an increased risk that "the offender would, if armed and faced with capture, 'deliberately point the gun and pull the trigger.'" Harrimon, 568 F.3d at 535 (quoting Begay, 553 U.S. at 146); see Welch v. United States, 604 F.3d 408, 425 (7th Cir. 2010) ("An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest.")

(quoting Spells, 537 F.3d at 752, and brackets in original). Vehicular flight by its very nature "creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." Harrimon, 568 F.3d at 536 (quoting West, 550 F.3d at 964-965).

b. The decision below is also consistent with Chambers, which held that failure to report for penal confinement is not a violent felony under the ACCA. Vehicular flight from police presents risks different in kind and degree from those presented by the failure-to-report offense at issue in Chambers. Unlike the passive conduct of failing to report, vehicular flight from police cannot be characterized as "a form of inaction," Chambers, 129 S. Ct. at 692, because it involves deliberate movement to evade the police. See Pet. App. A6 ("[The Indiana statute's] knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by choosing to continue driving rather than pull over."). For that reason, vehicular flight from police is similar not to the crime of failure to report for penal confinement but to the crime of escape from custody. Cf. Chambers, 129 S. Ct. at 691 (contrasting "[t]he behavior that likely underlies a failure to report" with "the less passive, more aggressive behavior underlying an escape from custody").

In addition, flight from an officer's command to stop involves a substantial and inherent risk of physical injury because of the "marked likelihood of pursuit and confrontation." Harrimon, 568 F.3d at 536; see ibid. ("[W]e think that, in the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape."). Vehicular flight, like escape from custody, is a continuing offense that encompasses conduct likely to occur at the end of the pursuit by law enforcement officers. See United States v. Martin, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offenses, which heighten the emotions and adrenaline levels of the parties involved, and which generally end with a confrontation between the officer and the escapee or fleeing driver.") (internal quotation marks and citations omitted). As with the ACCA's enumerated crimes (like burglary or arson), vehicular flight creates the potential for a dangerous confrontation between the suspect and other individuals.

2. Petitioner contends (Pet. 5-6) that the courts of appeals are in conflict over whether vehicular flight from police is a "violent felony" under the ACCA or a "crime of violence" under Sentencing Guidelines § 4B1.2(a).[2] But there is no disagreement among the courts of appeals with respect to offenses like

---

[2] The ACCA's definition of a "violent felony" is identical for present purposes to Sentencing Guidelines § 4B1.2(a)'s definition of a "crime of violence."

petitioner's that typically present a substantial risk of injury to police officers or other individuals.

Five courts of appeals (the First, Fifth, Sixth, Tenth, and Eleventh Circuits) have agreed with the Seventh Circuit that intentional flight from a law enforcement officer is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines. See United States v. McConnell, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines); United States v. Layton, 356 Fed. Appx. 286, 290 (11th Cir. 2009) (Guidelines), cert. denied, No. 09-9658 (June 21, 2010); Harrimon, 568 F.3d at 534-537 (ACCA); United States v. LaCasse, 567 F.3d 763, 767 (6th Cir. 2009) (ACCA), cert. denied, 130 S. Ct. 1311 (2010); Powell v. United States, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Those courts have reasoned that a driver's intentional act of fleeing from a law enforcement officer is a purposeful, violent, and aggressive act. See, e.g., Harrimon, 568 F.3d at 534-537.[3]

---

[3] In United States v. Rivers, 595 F.3d 558 (2010), the Fourth Circuit held that a conviction under South Carolina law for failure to stop for a blue light, S.C. Code Ann. § 56-5-750(A), does not constitute a violent felony under the ACCA. Rivers, 595 F.3d at 565. Unlike the Indiana statute at issue, however, the South Carolina blue light statute does not require that a driver have acted intentionally. Ibid. The Fourth Circuit reasoned that, as "a strict liability crime," the statute does not proscribe purposeful, aggressive, and violent conduct as required by Begay. Ibid. (quoting Begay, 553 U.S. at 148). Rivers therefore does not conflict with the decisions of several other courts of appeals that intentional vehicular flight is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines.

a. Petitioner claims (Pet. 6) a conflict with United States v. Tyler, 580 F.3d 722 (8th Cir. 2009), in which a divided panel held that the Minnesota offense of vehicular flight from a law enforcement officer is not a crime of violence under Sentencing Guidelines § 4B1.2(a). But the Minnesota statute at issue in Tyler differs significantly from the Indiana statute at issue here. Specifically, the Minnesota statute expressly defines fleeing an officer to include such nonviolent conduct as extinguishing headlights or taillights. See Tyler, 580 F.3d at 725. The Eighth Circuit reasoned that, because Minnesota has defined fleeing so broadly as to encompass nonviolent conduct, a violation of the Minnesota statute "do[es] not necessarily translate into a serious potential risk of physical injury." Ibid. The Eighth Circuit expressly distinguished, however, state statutes -- like the Indiana statute at issue here -- that do not define fleeing so broadly. Id. at 726.

b. Petitioner also claims (Pet. 5-6) a conflict with United States v. Jennings, 515 F.3d 980 (9th Cir. 2008). In Jennings, the Ninth Circuit held that a previous version of Washington's vehicular flight statute, Wash. Rev. Code § 46.61.024 (2001), did not categorically describe conduct that qualifies as a violent felony for ACCA purposes. According to the court, the Washington statute criminalized conduct that created a serious risk of harm not only to people, but also to property. Jennings, 515 F.3d at

989-990 & n.9. After the decision in Jennings, however, Washington amended its statute and removed the language (covering disregard for others' property) on which the Ninth Circuit had relied. Since that time, the Ninth Circuit has not concluded that any state offense involving flight from law enforcement does not qualify as a violent felony under the ACCA.

c. Petitioner further claims (Pet. 5, 11) a conflict with United States v. Harrison, 558 F.3d 1280 (11th Cir. 2009). The Florida statute at issue in Harrison created separate offenses for simple vehicular flight and aggravated vehicular flight that recklessly disregards the safety of persons or property. See Fla. Stat. § 316.1935(1), (2), and (3). In Harrison, the Eleventh Circuit held that simple vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. See 558 F.3d at 1291, 1295-1296.

Here, the Indiana statute provides that intentional flight from a law enforcement officer is a Class D felony if the defendant "uses a vehicle to commit the offense," Ind. Code § 35-44-3-3(b)(1)(A), or "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B). Relying on Harrison, petitioner argues (Pet. 11-12) that because he was convicted of simple vehicular flight under subsection (b)(1)(A) -- and not vehicular flight that

"creates a substantial risk of bodily injury" to others under subsection (b)(1)(B) -- his conviction was not for a violent felony. That argument, however, confuses the relevant inquiry under the ACCA and the Guidelines. The question is not whether vehicular flight in a particular case creates an actual risk of death or injury to third parties, but whether vehicular flight in a typical case creates a potential risk of serious harm to others.

As other courts of appeals have recognized, even if vehicular flight does not create an actual risk of death or injury to bystanders or others, it still creates "a serious potential risk" in the typical case. Sentencing Guidelines § 4B1.2(a)(2). For instance, the Sixth Circuit held in considering a similar Tennessee state statute that "[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create the actual risk of death or injury that would make it a Class D felony under Tennessee law." United States v. Rogers, 594 F.3d 517, 521 (6th Cir. 2010), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010); see James v. United States, 550 U.S. 192, 208 (2007) ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."). The Fifth Circuit likewise held in Harrimon that "while it is possible * * * to be guilty of fleeing by vehicle despite obeying all traffic laws

and later surrendering quietly, * * * in the typical case, an offender * * * will not hesitate to endanger others to make good his or her escape." 568 F.3d at 536. This case illustrates that point: petitioner's prior conviction for vehicular flight involved driving on the wrong side of the road, as well as driving through residential yards in which people were standing before striking the rear of a house. See p. 3 n.1, supra.

Moreover, the Eleventh Circuit's decision in Harrison is distinguishable because the court's holding rested on the limited evidentiary record in that case. See 558 F.3d at 1295-1296. The court recognized that in similar cases the Supreme Court "has used statistical evidence to aid its risk assessment" and that its own consideration "would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or reckless disregard." Id. at 1294-1295. "[B]ased on the limited record," which did not contain any "empirical data," the court concluded that the government had not satisfied its burden of showing that the Florida offense was a violent felony for ACCA purposes. Id. at 1296. Thus, the court left the door open for the government to make such a showing on a more developed factual record in a future case. Ibid.

Other courts have considered the sort of statistical evidence not present in Harrison. For instance, the Fifth Circuit in

Harrimon noted that according to a study "collecting police pursuit data from fifty-six law enforcement agencies in thirty states, 914 injuries (including fatal injuries) to police and bystanders resulted from 7,737 reported pursuits," or "roughly .04 injuries to others per pursuit." 568 F.3d at 537. By comparison, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." Ibid. The Fifth Circuit therefore concluded that "the risk of injury to others [from vehicular flight] would appear to be at least 'roughly similar' to that associated with arson." Ibid. (quoting Begay, 553 U.S. at 143). In light of the Fifth Circuit's analysis, this Court's review would be premature, because the Eleventh Circuit should be permitted to revisit the question on a more developed evidentiary record.

3. Further consideration in the courts of appeals -- including examination of pertinent differences among the state statutes in question -- will bear directly on the need for this Court's review. The Court has denied several petitions for writs of certiorari presenting the question of whether prior convictions under state statutes -- including this same Indiana statute -- qualify as violent felonies under the ACCA or crimes of violence under the Guidelines. See Spells v. United States, 129 S. Ct. 2379 (2009) (No. 08-8136) (Indiana statute); see also Layton, 2010 WL 979076 (June 21, 2010) (No. 09-9658) (Florida statute); Collier v.

United States, 130 S. Ct. 1882 (2010) (No. 09-7631) (Texas statute); LaCasse v. United States, 130 S. Ct. 1311 (2010) (No. 09-8204) (Michigan statute); Sneed v. United States, 130 S. Ct. 1285 (2010) (No. 09-7276) (Texas statute); Harrimon v. United States, 130 S. Ct. 1015 (2009) (No. 09-6395) (Texas statute). The same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

REPLY BRIEF

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No. 09-11311

Supreme Court, U.S.
FILED
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SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief for the United States in Opposition [Government Brief] fails in its attempt to explain away the conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case, *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010), and the opinions of other circuits which have reached the opposite conclusion on the issue.

The Minnesota statute at issue in *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009), and the Indiana statute at issue in *Sykes* both use the term "flees" in defining the crime. While the Indiana statute does not define that term and the Minnesota statute provides a definition, there is nothing in the Minnesota definition which renders the crime more narrow or passive than the crime defined in Indiana. The Minnesota statute includes some examples of "flee," but the examples do not narrow the definition because they are followed by the catch-all phrase "or use other means with intent to attempt to elude a peace officer."

The Indiana statute, I.C. 35-44-3-3 applies to a broad range of conduct. In *Smith v. State*, 809 N.E.2d 938 (Ind. App. 2004), the defendant, a back seat passenger in a vehicle which did not stop when a police officer activated emergency lights and siren, was convicted of a violation of the statute at issue because he "took the license plate out of the car's rear window so that the police could not identify Lile's car." *Id.* at 945.

The seventh circuit acknowledged a split in the circuits in *Sykes* and continues to recognize the split. In *United States v. Askew*, ___ Fed. Appx. ___, 210 WL 2711276 (7th Cir. 2010) (unpublished) the court held that the Minnesota vehicular fleeing statute is a crime of violence; this is the same statute the eighth circuit held to be a crime of violence in *Tyler*. The court in *Askew* said,

> "We recognize here, as we did in *Dismuke* and *Sykes*, that the Eighth and Eleventh Circuits see things differently when it comes to motor vehicle fleeing convictions. *United States v. Furqueron*, 605 F.3d 612 (8th Cir.2010); *United States v. Johnson*, 601 F.3d 869 (8th Cir.2010); *United States v. Tyler*, 580 F.3d 722 (8th Cir.2009); *United States v. Harrison*, 558 F.3d 1280 (11th Cir.2009). *Contra United States v. Hudson*, 577 F.3d 883 (8th Cir.2009). In fact, in *Furqueron*, *Johnson*, and *Tyler*, the Eighth Circuit reached a different conclusion concerning the very Minnesota statute at issue here. *Id.* at *4

The government's attempt to reconcile *Sykes* with *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009) is equally unpersuasive. The statutory structure of the Florida statute considered in *Harrison* is identical to the Indiana statute and supports the conclusion that the crime of Mr. Sykes's conviction is not properly considered a crime of violence. The only difference is that the Florida statute treats one of the crimes as a "felony of the third degree" and the other as a "felony of the second degree" whereas in Indiana both crimes are Class "D" felonies.

The Government Brief erroneously contends that Petitioner's argument in the Petition for Writ of Certiorari "confuses the relevant inquiry under the ACCA and the Guidelines." Petitioner recognizes

that the question is whether a typical violation of the statute at issue creates a risk of serious harm to others and Petitioner has never argued that the issue is whether "vehicular flight in a particular[1] case creates an actual risk of death or injury to third parties" as the Government Brief contends.

The relevance of the two separate crimes defined by the Indiana and Florida statutes is that one of the two crimes includes a substantial risk of bodily injury as an element of the crime and the other does not include that element. Mr. Sykes's conviction was for the crime which does not include risk of injury as an element of the crime.

The Eleventh Circuit's description of the "ordinary case" under the Florida statute applies equally to the Indiana statute. The court said,

---

[1] The Petition for Writ of Certiorari makes no mention of the underlying facts of Mr. Sykes's prior conviction for vehicular fleeing, but the Government Brief does recite a statement of the facts of that conviction from the Presentence Investigation Report. [See Government Brief P. 3, fn1]. The underlying facts of Mr. Sykes's previous conviction are not relevant to whether the prior conviction is a violent felony. *Shepard v. United States*, 544 U.S. 13 (2005).

> "Florida's statutory elements drive our assessment of the 'ordinary case' of the statutory violation in § 316.1935(2). The behavior ordinarily underlying the crime in § 316.1935(2) involves only this conduct: (1) a law enforcement vehicle, with its siren and lights activated, signals the motorist to stop and (2) the motorist willfully refuses or fails to stop the vehicle. Our 'categorization' of the crime here, as it is ordinarily committed, reflects the Florida legislature's decision to differentiate between very different types of fleeing behavior. The Florida legislature has not included either high speed or wanton disregard for persons or property as elements of a § 316.1935(2) crime." *Id.* at 1293.

The Indiana legislature made the same decision as the Florida legislature in creating the two separate crimes, one of which has as an element "a substantial risk of bodily injury to another person" and one of which does not; Mr. Sykes was convicted of the crime which does not include the element of a "substantial risk of bodily injury to another person."

The Government Brief argues that fleeing in a vehicle in violation of the Indiana statute satisfies the *Begay* requirement that the crime be similar in kind to the enumerated crimes: burglary, arson, extortion, and the use of explosives, but the argument is incomplete. The Court in *Begay*, said that the inclusion of these specific crimes in

the statute "indicates that the statute covers only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" *Begay v. United States*, 553 U.S. 137, 142. The Court in *Begay* held,

> "DUI differs from the example crimes – burglary, arson, extortion, and crimes involving the use of explosives – in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, "violent," **and** "aggressive" conduct. [Emphasis added]" *Id.* at 144-5.

The Government Brief correctly asserts that the Indiana statute applies only to purposeful conduct, but the government is unable to explain how the conduct to which the Indiana statute applies is either "violent" or "aggressive." The typical case of purposefully failing to stop when ordered to do so by a police officer is neither "violent" nor "aggressive."

The holding of *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008), which is in conflict with *Sykes*, is significant in spite of the fact that the statute upon which it was based has been amended. In *Jennings*, the court held that the crime of vehicular fleeing under the Washington statute was not a violent felony because "Washington's

attempting to elude a pursuing police vehicle statute 'is missing an element of the generic crime'– here, the actual or potential risk of harm to another – 'altogether.'" *Id.* at 993. The Indiana statute at issue here is identical to the Washington statute in that it does not have as an element the actual or potential risk of harm to another. As discussed above, Indiana has a vehicular fleeing statute which includes fleeing in a way that creates a substantial risk of bodily injury to another person, but that element is not included in the statute under which Mr. Sykes was convicted. In spite of this similarity, the seventh circuit in *Sykes* and the ninth circuit in *Jennings* reached directly conflicting conclusions regarding whether the crime was a violent felony.

The lack of empirical evidence to support the conclusion that vehicular fleeing is a violent felony is not a reason to allow this split in the circuits to continue to exist as the Government Brief suggests, rather it is an admission that the government is unable to carry it's burden to demonstrate that the crime is a violent felony.

In deciding *Harrison*, the eleventh circuit had access to the same empirical data as the fifth circuit had when it decided *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009). *Harrison* was decided three months before *Harrimon*, February and May, 2009 respectively but the data cited by the fifth circuit was published in September 2008. See, Police Pursuits in an Age of Innovation and Reform, International Association of Chiefs of Police, (2008).

The title of the study cited by the fifth circuit demonstrates that it deals with only a subset of the cases covered by a vehicular fleeing statute, not the typical case. The data collected by the IACP was reported by local agencies without the benefit of a definition of "pursuit." A statement in the report's recommendations suggests that at least the authors were thinking in terms of high speed chases. The recommendation said, "[p]olice agencies should consider the use of information systems already available which allow them to record every high speed police pursuit. . . ." *Id.* at 75.

A decision by the Court on this issue would benefit from improved empirical data, but the lack of data is not a reason to allow the situation to exist in which a person arrested for possessing a

firearm with a previous conviction for vehicular fleeing in Minnesota will receive a longer sentence if he is arrested across the state line in Wisconsin than if he were arrested at home. If he has two other previous convictions for drug trafficking or violent felony convictions his sentence will be 15 years to life in prison if he is arrested in Wisconsin, but only a maximum of 10 years in prison if he is arrested in Minnesota. Such disparities promote disrespect for the law.

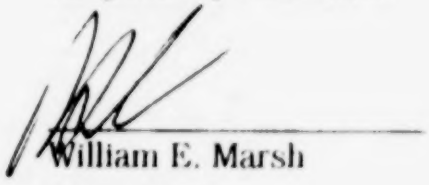
The seventh circuit recognized in the *Sykes* opinion [598 F. 3d at 225] that the court's conclusion was in direct conflict with other circuits. The Government Brief fails in it's attempt to demonstrate that this conclusion was incorrect.

CONCLUSION

The petitioner respectfully requests that a writ of certiorari be granted.

Date: August 18, 2010

Respectfully submitted,



William E. Marsh

No. 09-11311

SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PROOF OF SERVICE

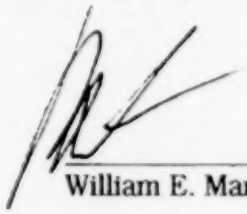
I, William E. Marsh, do swear or declare that on this date, August 18, 2010, as required by Supreme Court Rule 29 I have served the enclosed PETITIONER'S REPLY BRIEF on each party to the above proceedings or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served as are follows:

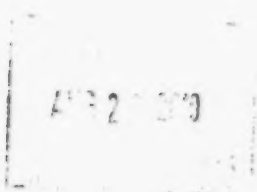
Neal Kumar Katyal, Acting Solicitor General, 950 Pennsylvania Avenue, NW, Room 5614, Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2010



William E. Marsh



JOINT APPENDIX

Supreme Court, U.S.
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No. 09-11311

In The Supreme Court of the United States

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MARCUS SYKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

♦

JOINT APPENDIX VOL. 1

♦

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Certiorari Granted September 28, 2010

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DOCKET ENTRIES

United States District Court, Southern District of Indiana, *United States v. Marcus Sykes*, Docket No. 1:08-cr-00095-LJM-KPF-1

Date	#	Description
06/18/08	14	Indictment as to Marcus Sykes
06/27/08	20	Petition to Enter a Plea of Guilty and Request for Presentence Investigation
07/22/08	26	Courtroom Minutes for proceedings held before Judge Larry J. McKinney: Plea Agreement Hearing as to Marcus Sykes held on 07/22/08. Court finds factual basis for plea and plea voluntarily made. Court accepts Plea Agreement and adjudges deft guilty as charged.
10/08/08	28	Courtroom Minutes entry for Sentencing held before Judge Larry J. McKinney on 10/8/2008: Defendant Marcus Sykes appears in person and by FCD counsel James McKinley. Appearance for the USA by AUSA Matt Rinka. USPO represented by Mike Burress. Sentence imposed.
10/14/08	29	Judgment as to Marcus Sykes, Count 1, Imprisonment : 188 months, Supervised Release: 5 years. Court recommends that Defendant be designated to a facility close to his family in Indianapolis, IN, such as FCI, Terre

United States Court of Appeals for the Seventh Circuit, *United States v. Marcus Sykes*, Docket No. 08-3624

Date	#	Description
03/27/09	8	Appellant's Brief filed by Appellant Marcus Sykes
04/28/09	9	Appellee's Brief filed by Appellee USA
08/20/09	10	Order: The parties file supplemental memoranda in light of this court's decision in United v. Woods, No. 07-3851, 2009 WL 2382700 (7th Cir. Aug. 5, 2009). The memoranda are due by September 9, 2009.
09/10/09	11	Filed by Appellee USA Supplemental Memorandum
09/16/09	12	Instanter motion filed by Appellant Marcus Sykes to file supplemental memorandum.
11/04/09	13	Order re: "Motion for Leave to File Instanter Appellant's Supplemental Memorandum." It is ordered that the motion is granted. The clerk of this court shall file instanter the tendered copies of appellant's supplemental memorandum.
11/04/09	14	Supplemental Memorandum filed by Appellant Marcus Sykes

12/02/09	18	Filed Appellant Marcus Sykes Citation of Additional Authority, per Circuit Rule 28(e)
12/11/09	19	Case heard and taken under advisement by panel: William J. Bauer, Circuit Judge; Kenneth F. Ripple, Circuit Judge and Michael S. Kanne, Circuit Judge.
12/11/09	20	Case argued by James C. McKinley for Appellant Marcus Sykes and Matthew J. Rinka for Appellee USA
01/06/10	21	Filed Appellee USA Citation of Additional Authority, per circuit rule 28(e)
03/12/10	22	Filed opinion of the court by Judge Bauer, Affirmed.
03/12/10	23	Order: Final Judgment filed per opinion
03/18/10	24	Motion filed by Appellee USA to correct opinion.
03/22/10	25	Order re: Motion for Leave to Correct Opinion. The motion is Granted. On page 3, the fourth line of the first full paragraph is amended to read, "convicted of three or more violent felonies."
04/05/10	26	Mandate issued

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CAUSE NO. 1:08-CR-95-LJM-KPF-01
-vs-	)	Indianapolis, Indiana
	)	October 8, 2008
MARCUS SYKES,	)	11:00 a.m.
Defendant.	)	

BEFORE THE
HONORABLE LARRY J. McKINNEY

OFFICIAL REPORTER'S TRANSCRIPT OF
SENTENCING

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PROCEEDINGS TAKEN BY
MACHINE SHORTHAND
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[2] *(In open court)*

THE COURT: This is United States versus Marcus Sykes. This is set today for sentencing.

Mr. Sykes, you and your lawyer want to step up to the lectern, please?

(Defendant sworn.)

THE COURT: Can I have your name for the record?

THE DEFENDANT: Marcus Sykes.

THE COURT: You're the same Marcus Sykes that pled guilty to this charge of being a felon in possession of a firearm?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You understand, Mr. Sykes, that today is set for your sentencing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you had an opportunity to go over the presentence investigative report with your lawyer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I would like to call your attention to paragraphs 24 through 31 that conclude that there is a total offense level in this matter of 31. I note that your counsel has filed objections to that number; and I will hear at this time from you, Mr. McKinley, regarding your view of the total offense level here.

MR. McKINLEY: Your Honor, very briefly, the [3] difference between the probation officer's calculation and what I submit is the proper calculation lies in the question of whether Mr. Sykes possessed this firearm in connection with another felony offense. The issue stems from numbered paragraph 8, which indicates that just prior to Mr. Sykes' arrest, that he attempted to rob two people with a firearm who were sitting in a parked car of the Rural Inn in Indianapolis.

Mr. Sykes denies that he attempted to rob anyone that evening. He does acknowledge that he had contact with the female – with I believe a passenger in the car, which is a woman that he knew he spoke with her. There was a brief argument that ensued with the driver of the car. There were words exchanged and Mr. Sykes left.

So Mr. Sykes denies that he possessed the firearm in connection with another felony offense, which in turn has the impact of starting the base offense level on the Armed Career Criminal Act at a 33 instead of at a level 34.

It changed his criminal history category to a criminal history category VI from a criminal history Category IV. Under the guideline provisions pertaining to the Armed Career Criminal Act, if you possess the firearm in connection with a violent felony, it's automatically a criminal history VI. His actual criminal history is IV.

So again, we maintain that because the enhancement for possession in connection with another offense should not [4] apply, he should start out as a criminal history IV instead of a criminal history VI, which in turn reduces his guideline range, instead of – I think the PSR has it calculated at 188 to 235.

We maintain that he should be a – it should be a level 30, criminal history IV, which is 135 to 168, which, of course, is trumped by the mandatory minimum 180 months. That's our position, Your Honor.

THE COURT: I thought the two other felonies put him in the category VI. Is that not right?

MR. McKINLEY: I'm not sure I understand your question.

THE COURT: I thought in order to be a career – an armed career criminal – oh, I see. Never mind.

MR. McKINLEY: As far as the Armed Career Criminal Act – the application of the Armed Career Criminal Act, he has two prior robberies that were committed within moments of each other back

when he was 18. We acknowledge that those serve as predicates for the ACCA.

He also has a prior felony resisting conviction, and it's our position that that should not count as a predicate under the Armed Career Criminal Act pursuant to the Supreme Court's decision in Begay.

As I noted in my objection to that, the 7th Circuit has decided that issue contrary to our position. We filed the [5] position to preserve that for review.

It appears under – at this point the status of the law in the 7th Circuit is that he is subject to the Armed Career Criminal Act, but that is an issue separate and distinct from the calculation under the Armed Career Criminal Act guideline as to where he should start and what his criminal history should be.

THE COURT: Okay. So if – so I jumped into the criminal history category too soon here evidently. All right. Let me hear from the Government on that issue.

MR. RINKA: Judge, if I understand Mr. McKinley's arguments correctly, based on the papers he's already filed, it's kind of a two-pronged approach.

One is they're reserving the armed career criminal issue because of pending cases before the 7th Circuit. As the matter stands right now, this defendant is clearly an armed career criminal under the statute and according to the case law of this circuit. So I'm not going to address that further. I'll just say

they may preserve that issue, but I'm not going to comment anymore than that.

The second issue deals with his –

THE COURT: Let me get this clear. He is an armed career criminal, and the total offense level is 31?

MR. RINKA: Yes, Your Honor. The Government believes that the PSI is correctly scored. We believe that it [6] is a 34/VI; and, of course, he gets three points for acceptance of responsibility. The Government does not dispute that at all. It drops him down to a 31/VI for sentencing purposes. So that's the Government's position.

Now, in the Government's view, the facts of this case demonstrate that Mr. Sykes on the evening in question attempted to rob two people outside a Rural Inn here in Indianapolis. Apparently recognized one of the individuals, decided rightfully so that it was not a good idea to continue to pursue that endeavor and began to walk away.

But those two individuals immediately flagged down police officers who located Mr. Sykes nearby and observed him with a handgun.

Now, the Government's argument would be had Mr. Sykes not attempted to rob these two individuals, what possible reason would they have had to flag down a passing Indianapolis Metropolitan police officer and point out Mr. Sykes and indicate that he

attempted to rob them with a small revolver, which the police then found.

So the Government believes the factual basis is sufficient to sustain the scoring that the probation office has utilized in preparing the PSI. So we believe he starts out as 34/VI. Three points for acceptance of responsibility drops him down to 31/VI, and 180 to 235 is the appropriate guideline range.

[7] THE COURT: If I found that his argument on the robbery or attempted robbery was correct, where would it be?

MR. RINKA: If you follow the PSI that the robbery –

THE COURT: If I accepted Mr. McKinley's argument that there was not a robbery in progress, where would he be?

MR. RINKA: As I understand it from the PSI, which at this point we have no reason to dispute, the alternative scoring would give him 8 criminal history points total. Of course, that places him in Category IV.

Additionally, because the firearm was not used during – in connection with a crime of violence, instead of being a 34/VI, he would start out at a 33/IV, and then he would drop down 3 points. So he would be placed in the category 30/IV, 30 being the offense level, IV being the criminal history category, guideline range 135 to 168.

And of course, the statutory mandatory minimum trumps that. So it's 180 months.

THE COURT: All right. And the evidence that he was involved in a – or at least was about to rob these people is their statement to a policeman?

MR. RINKA: It was information collected by the police department. I do have a report which I'm more than happy to mark as Government's Exhibit No. 1 or A for the purposes of this proceeding in which the reporting officer, [8] who I understand was Michael Kerman, prepared, if the Court would like to see it.

MR. McKINLEY: No objection, Your Honor, to the report. We've seen the report. We've been provided with a copy.

THE COURT: Thank you. I'll mark this as Government's Exhibit No. 1.

(Government's Exhibit 1 was received in evidence.)

THE COURT: Okay. Anything else on the issue.

MR. RINKA: Nothing further from the Government on the issue, Judge.

THE COURT: All right. Thank you.

Anything further from you, Mr. McKinley?

MR. McKINLEY: No, other than to confirm that I agree with Mr. Rinka's calculation as to how it would shake out if this Court were to find that the Government's evidence is insufficient to establish that he possessed the firearm in connection with another felony offense.

Again, it would be a 33, less 3 for acceptance, which would take him to a level 30, criminal history IV. That would generate the 135 to 168 range, trumped by the mandatory 180-month minimum.

THE COURT: All right. Looking at Government's Exhibit 1 and examining paragraph 8 and noting that Mr. Sykes has denied that he was involved in a felony at the time of the [9] possession of a handgun, the Court now finds that the Exhibit 1 is sufficient for a finding that the gun was being used in a robbery – or attempted robbery or carjacking or attempted carjacking at the time that he was arrested or shortly before the time he was arrested with that same gun.

I'm going to find that the base offense level is correct, that the Chapter 4 enhancement of paragraph 23 is correct and that the total offense level is a 31.

Looking at the criminal history category with that finding, the criminal history category is a VI. Do you have any other objection to that criminal history category?

MR. McKINLEY: No, Your Honor.

THE COURT: All right. Is there anything else, Mr. Sykes, contained within the presentence investigative report with which you disagree or that you would like to bring to my attention?

MR. McKINLEY: We have no other objections or corrections to make to the report, Your Honor.

THE COURT: Then I will hear what you have to say regarding the sentence in this matter, finding that the total offense level is 31, criminal history category is VI; and the guideline is 188 to 235 months.

MR. McKINLEY: Your Honor, Mr. Sykes would request to address the Court personally –

THE COURT: Certainly.

[10] MR. McKINLEY: – regarding his situation.

THE COURT: Mr. Sykes.

THE DEFENDANT: I just want to – I take full responsibility for holding that gun, Your Honor. I know that I done made some mistakes – you know what I'm saying – in the past. I don't know. I keep trying to do the right thing, but I end up keep getting in trouble for some reason.

I want to apologize to my grandmother because I keep on getting in trouble –

THE COURT: Is this your grandmother here?

THE DEFENDANT: Yes – my grandmother because I keep getting in this trouble putting her through this stress; to my step-kids, to my fiancé, Montrell, and to the Courts. I mean, I didn't try to rob them people, but I did hold the gun. I just want to say I apologize.

THE COURT: All right. Thank you.

Mr. McKinley?

MR. McKINLEY: Your Honor, I want to ask the Court to peg the sentence at the mandatory minimum, 180 months. I think there's compelling reasons why that is an appropriate sentence, given the application of the Armed Career Criminal Act.

I would note first of all, Your Honor, that Mr. Sykes submitted to an interview by law enforcement – in fact, I believe it was with Special Agent McCart from ATF – [11] the day after he was arrested in this case.

He waived his Miranda rights, sat down with him; initially denied his possession of firearm but shortly thereafter, acknowledged that he had, in fact, possessed it. He answered a number of questions. He attempted to cooperate. There was really no question from the beginning of his case that he was going to enter a plea of guilty.

That decision to plead early on has saved the Government and the Court, obviously, a considerable amount of time and resources that would have to be expended in preparing the case for trial.

Even though he was arrested by state authorities in March, he did not come into federal custody until May. He was indicted in June, and we filed a plea petition shortly after that. We would have filed it sooner, but there were some complications that arose by virtue of the Supreme Court's intervening decisions in Begay as to what impact it would have. There was no question early on as to where this case was going. I would ask the Court to factor that into the mix.

The second point, Your Honor, is I would submit that Mr. Sykes is not a man without some redeeming characteristics. The fact of the support that he's shown or I think the support that's evident in this courtroom today by the appearance of those who are close to Marcus are very supportive of Marcus reflects very favorably on him.

[12] His grandmother, Lois, is here. She's the one who raised Marcus from infancy after Marcus lost his mother tragically at a very early age. His father abandoned him. His fiancé, Montrell Peterson, is here. Two of her children, I believe, has written a letter to the Court.

THE COURT: Two very nice letters.

MR. McKINLEY: I think all of that reflects favorably on him and the prospects for rehabilitation, prospects for him being a contributing member of the community once he's released.

When we look at the classic purposes of punishment which are all incorporated in 3553(a), Your Honor, retribution, deterrence, incapacitation and rehabilitation, I submit that it's – that this mandatory minimum 180-month sentence is more than sufficient to satisfy those. It's hard to see how any of those interests and purposes of criminal punishment are promoted anymore with a sentence of 188 months or 192 months or 200 months than they would be with a statutory minimum 180 months.

In preparing for today's hearing, I did a real review of my own handling of cases in this district, a felon in possession case turned Armed Career Criminal Act. I know Your Honor is very familiar with them. I've been involved in eight of them and I took a poll in my office. Of the eight I've been involved with, four went to trial; and the sentences [13] after trial ranged from 188 months on the low end – that was with Stanley Gilbert, I believe, that Bill Marsh represented – to a high of 240 months, which this Court imposed following a jury trial in United States versus Loumard Harris, which Your Honor may have some recollection of.

Of the four guilty pleas that I have personally handled in this district involving the Armed Career Criminal Act, every one was sentenced the same, to 180 months, including United States versus Clifton Daly, which was a case involving a high-speed chase on East Washington Street, after which Mr. Daly was apprehended and found to be in possession of a

loaded handgun and a number of stolen checks, identity theft items.

United States versus Frederick Ford, a sentence back in 2004 by Judge Barker, to 180 months; United States versus Raymond Marbley back in 2006, Judge Hamilton sentenced to 180 months.

Most recently United States versus Lawrence Sowers before Judge Hamilton, Mr. Sowers had six ACCA predicate offenses, including three drug trafficking offenses, two armed robberies and burglary and a lesser offense – a lesser included offense that flowed from a trial where he was originally charged with capital murder. Mr. Sowers received a sentence of 180 months.

The fact of the matter is that regardless of what [14] event immediately preceded this, the offense of conviction here, Your Honor, is possession of a an [sic] gun. And I don't want to diminish the seriousness of what this is; but given that two of the predicates here are robberies of individuals that occurred 13 years ago when Marcus was 18 years old, really, two robberies that were really during the course of the same episode, so to speak, but for that fact and the way those are interpreted with the ACCA and the 7th Circuit, we would be looking at a much different sentence here.

But for the 7th Circuit's determination that felony resisting is a crime of violence and an ACCA predicate – and with all due respect to the 7th Circuit, I question

the correctness of that decision; and we hope to be revisiting that issue down the road.

But absent the application of the Armed Career Criminal Act, what we would be looking at here is a sentence of I think 57 to 71 months. We're looking at five, six years that has basically been tripled by the mandatory minimum that applies in the case of the ACCA.

15 years is a very, very heavy hit for possession of a firearm. Again, I don't mean to depreciate the seriousness of it; but it's a long time, Judge. It's enough. It is certainly sufficient. One could argue more than sufficient to comply with the purpose of sentencing.

And combined with his personal circumstances and his [15] decision to plead early in this case, I submit that it's enough; and it would be a sentence that would be appropriate to avoid unwarranted disparity among similarly situated individuals who have been sentenced in this judicial district.

THE COURT: Thank you. You can have a seat, and I'll hear from the Government.

MR. RINKA: Judge, I think we've covered most of this before. The Government really – we don't have any dispute with the scoring of the PSI, particularly as it relates to Mr. Sykes' acceptance of responsibility for a firearm that evening.

While disappointed that he continues to argue that there was nothing else going on that evening, the

Government believes that that third point for acceptance of responsibility is appropriate.

Reading the PSI, the Government is struck by the fact that Mr. Sykes has had a fairly lengthy criminal history dating back to when he was 11 years old. It seems that perhaps minor interactions with law enforcement continually got more and more serious as time went on, and there were several significant altercations even at school; some significant batteries.

He struck a bus driver; struck the principal of his school at age 11; hit the bus driver at age 12; fighting with teachers at age 14. You know, the police would respond; and [16] he was less than cooperative with them.

At age 18, the wheels come off the wagon; and there was that very serious armed robbery. Actually, before that at age 16, he was committed to the Indiana Boy's School. But age 18 is where – he gets 10 years in the Department of Corrections at age 18. When he gets out, he was revoked twice and sent back to DOC because of other infractions.

It's clear to the Government that this is the kind of person that the armed career criminal statute is aimed at and targeted toward. There's really no explanation for Mr. Sykes' continued violations of the law, and it's very clear that he has a very serious problem with authority and apparently thinks he's going to do whatever he wants to do regardless.

Nevertheless, looking at the criminal history, you know, he did five years for the armed robbery, a little bit less, about four, more or less, got out and went back a couple more times for probation violations.

But by far, the sentence he faces here in this court today is going to be the most lengthy that he has seen by far. It's the Government's hope that – you know, we look at the 3553(a) factors, and we balance the need for this community to be protected from people like Mr. Sykes and from Mr. Sykes himself who obviously feels it's – or at the time anyway felt it was acceptable to rob people at gunpoint.

[17] We feel a need that the appropriate message be sent to Mr. Sykes and to people in this community that this kind of behavior will not be tolerated.

Respect for the law in the sense that being a felon in possession of a firearm is not something that is a matter of rights. If you are a felon, you are absolutely, categorically prohibited from possessing a firearm; and the United States Government takes that very seriously.

We also balance that against the need for the rehabilitation of Mr. Sykes. At 31 years old, I have no doubt that if Mr. Sykes applied himself, received some training and really committed himself to being a positive member of this community, he probably could be, if he wanted to be, when he was released.

So balancing all of those things and taking a look at the scoring of the PSI, the Government believes

that a sentence within the guideline range would be a reasonable and appropriate resolution to this case.

The Government believes even a sentence within the middle to low end of the range would be – would be an appropriate resolution of this case. That's all I have, Judge.

THE COURT: Thank you, Mr. Rinka.

Mr. McKinley, you and your client want to step back up here, please?

[18] Anything else either of you would like to say?

THE DEFENDANT: No, Your Honor.

MR. McKINLEY: No, Your Honor. Thank you.

THE COURT: We start here, Mr. Sykes, with the statement by the Congress that if you plead guilty to or are found guilty of this felon in possession under these circumstances, you receive a minimum of 15 years and a maximum of life, which is the congressional statement of how serious this crime is viewed.

I look at the guidelines in this case. The base offense level and the criminal history category both take into account your record in this case. And the adding of the 4 points, which the Court found was appropriate, and the use or possession of the firearm in connection with another felony, that all causes these enhancements that your counsel has very accurately pointed out.

So it is my view that the guidelines do take into account the appropriate matters and put the range within the range of 188 to 235, within an appropriate range for this conduct, given your history. As I say, the history is fully accounted for in that guideline calculation.

And I look at 3553(a) to see if that guideline calculation reflects all the appropriate things or if there's something missing. Under 3553(a), again, I look at the nature and circumstances of the offense. As I have found, this is an [19] aggravated circumstance because of the use of that weapon at the time you were found with it. And your history and characteristics have, I think, adequately been reflected by this 188 to 235-month range.

I want this sentence to reflect the seriousness of the offense. And, of course, the Congress views it seriously, as to the guidelines, as do I. And I want to promote respect for the law with this sentence and give you just punishment that you deserve for this conduct.

I want to afford adequate deterrence to you and to others who are similarly situated to you, and I want to provide you with adequate education or vocational training and rehabilitation.

I think with that in mind that the guideline range is appropriate. I think within that range, given the importance of keeping the sentence within a consistent range of others, I think the 188 months is appropriate in this case. I think it does reflect all

these 3553(a) factors, particularly, your history and characteristics and the nature and circumstances of this particular offense.

So pursuant to the Sentencing Reform Act of 1984, it's my judgment that you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months.

I would consider a fine, Mr. Sykes. I'm not going to fine you in this case because you don't have the ability to [20] pay that fine.

You will forfeit the RG Industries .22 caliber revolver with serial number L483991.

On release from imprisonment, you will be placed on supervised release for a term of five years. Within 72 hours of release from the custody of the Bureau of Prisons, you'll report to the probation office in the district to which you're released. You will not commit another federal, state or local crime. You'll not possess a firearm, ammunition, destructive device or any other dangerous weapon.

You'll cooperate with the collection of a DNA sample. You'll refrain from any unlawful use of a controlled substance; and you'll submit to one drug test within 15 days of placement on supervised release and two periodic tests thereafter as directed by the probation officer.

Further, you'll comply with the standard conditions as adopted by the Judicial Conference of the

United States, as well as the following additional conditions:

You will provide the probation officer access to any requested financial information. You will not incur any new credit charges or open additional lines of credit without the approval of the probation officer. You'll participate in a program of testing for substance abuse, to include no more than eight drug tests per month and you'll pay a portion of the fees of testing.

[21] You'll submit to the search of your person, vehicle, office, business, residence, property, including computer systems and peripheral devices; and you'll submit to the seizure of contraband found, and you'll warn other occupants that the premises may be subject to the searches.

You do owe $100 as I mentioned during the course of your plea hearing. Do you have that to pay today?

MR. McKINLEY: No, Your Honor. Mr. Sykes is indigent. He has no funds.

THE COURT: You can pay that through the Inmate Financial Responsibility Program, and you'll be remanded to the custody of the United States marshal.

Mr. Sykes, you did have these two nice letters from these kids. You have proven when you want to, you can be a pretty decent person and take of those around you.

So anything else from the defense?

MR. McKINLEY: Your Honor, I would request that the Court include in the judgment a recommendation that Mr. Sykes be designated by the Bureau of Prisons to the complex in Terre Haute, Indiana, or otherwise the closest or – otherwise the closest facility.

THE COURT: I'll recommend that he be placed in Terre Haute so his family can visit him there. Anything else?

MR. McKINLEY: That's all, Judge. Thank you very much.

[22] THE COURT: Anything else from the Government?

MR. RINKA: Nothing else from the Government, Your Honor.

THE COURT: Thank you.

COURT CLERK: All rise.

(The proceedings were adjourned at 11:37 a.m.)

[Certificate Of Court Reporter Omitted In Printing]

598 F.3d 334 (2010)

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Marcus SYKES, Defendant-Appellant.
No. 08-3624.

Argued December 11, 2009.
Decided March 12, 2010.
As Amended March 22, 2010.

Matthew J. Rinka (argued), Office of the United States Attorney, Indianapolis, IN, for Plaintiff-Appellee.

James C. McKinley (argued), Indiana Federal Community Defenders, Inc., Indianapolis, IN, for Defendant-Appellant.

Before BAUER, RIPPLE and KANNE, Circuit Judges.

BAUER, Circuit Judge.

Defendant Marcus Sykes pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(e). The district court enhanced Sykes' sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), having determined that he had previously been found guilty of three violent felonies. We affirm.

I. BACKGROUND

On July 22, 2008, Sykes pleaded guilty to being a felon in possession of a firearm under 18 U.S.C.

§ 922(g)(1). He had been arrested for brandishing a gun while attempting to rob two people sitting in a parked car outside a liquor store in Indianapolis. Though Sykes aborted his robbery attempt, police saw him toss the gun aside and arrested him. Sykes pleaded guilty and the probation office issued a presentence report concluding that he was subject to a sentencing enhancement under the ACCA because he had three previous violent felony convictions – two convictions in 1996 for robbery and one in 2003 for resisting law enforcement, a Class D felony under Ind.Code § 35-44-3-3(b)(1)(A). Sykes objected to the enhancement. He argued that a conviction for resisting law enforcement in a vehicle under that provision of Indiana law is not a violent felony, despite our holding to the contrary in *United States v. Spells*, 537 F.3d 743, 753 (7th Cir.2008).

The district court rejected that argument, applied the enhancement and sentenced Sykes to 188 months in prison. He timely appealed.

II. DISCUSSION

Whether a prior conviction for resisting law enforcement is a violent felony under the ACCA is a legal conclusion we review de novo. *United States v. Samuels*, 521 F.3d 804, 815 (7th Cir.2008). On appeal, Sykes acknowledges our holding in *Spells* that fleeing law enforcement under Ind.Code § 35-44-3-3(b)(1)(A), counts as a violent felony under the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii). He contends,

however, that we should abandon *Spells* and follow the Eleventh Circuit, which recently held that a nearly identical Florida statute that punishes "fleeing law enforcement" is not a violent felony under the ACCA. *United States v. Harrison*, 558 F.3d 1280, 1292 (11th Cir.2009); *cf. United States v. Tyler*, 580 F.3d 722, 726 (8th Cir.2009) (holding that Minnesota's resisting statute, which required increased speed or reckless driving, is not a violent felony under the ACCA's residual clause). For the reasons discussed below, we decline to do so.

The ACCA mandates a fifteen-year mandatory minimum prison sentence for anyone convicted under 18 U.S.C. § 922(g)(1), if that person has previously been convicted of three or more violent felonies. 18 U.S.C. § 924(e)(1). A violent felony is "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

Typically, our task would be to apply the categorical approach for determining whether a prior conviction is a violent felony, set out by the Supreme Court in *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008). *Begay* requires us to first "categorize" the conduct proscribed by making a determination based on the statutory elements of the crime, as to what type of conduct characterizes the

typical commission of the crime. *Id.* at 1586-87; *United States v. Dismuke,* 593 F.3d 582, 588-89 (7th Cir.2010). Once we have identified the conduct involved in a typical commission of the predicate crime, we then employ a two-step analysis to determine whether that typical violation is a violent felony under the ACCA. In the first step, we determine whether the conduct involves a similar degree of risk of serious bodily injury to others as the crimes listed in the ACCA – burglary, arson, extortion and the use of explosives. *Dismuke,* 593 F.3d 582, 589-90. Second, the typical predicate crime must also be similar in kind to the ACCA's enumerated crimes, meaning it must involve the same kind of "purposeful, violent and aggressive" behavior that shows "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Spells,* 537 F.3d at 751-52. When a predicate offense satisfies these requirements, it qualifies as a violent felony under the ACCA.

In "categorizing" Sykes' predicate crime we know, based on the presentence investigation report (PSR), and defense counsel's statements at sentencing and in the briefs, that he was convicted under Ind.Code § 35-44-3-3(b)(1)(A), a class D felony. Less than two years ago in *Spells,* we held that a conviction under this provision is a violent felony under the ACCA. 537 F.3d at 753. Decided after *Begay, Spells* followed the Supreme Court's categorical approach for ascertaining whether an offense is a violent felony under the ACCA. Applying this framework to Indiana's statute,

we held that "fleeing an officer, in a vehicle, in violation of Ind.Code § 35-44-3-3(b)(1)(A), constitutes a violent felony." *Id.* at 752. We first decided that the act of fleeing an officer in a vehicle involves a "serious potential risk of physical injury" to others, a decision we impliedly endorsed in *Dismuke,* 593 F.3d 582, 594-95. We next held in *Spells* that resisting law enforcement in a vehicle under Indiana law typically involves conduct that is "purposeful, violent and aggressive" such that there is an increased likelihood that the "offender is the kind of person who would deliberately point [a] gun and pull the trigger." *Spells,* 537 F.3d at 752 (quoting *Begay,* 128 S.Ct. at 1587). Indiana's resisting statute criminalizes flight that is done "knowingly and intentionally," which satisfies the requirement that the conduct be purposeful, in contrast to DUI, which is more like a strict liability offense. *Id.* at 751. In addition, besides daring a cop to endanger himself by giving chase, the act of fleeing police in a vehicle typically creates a risk of harm to other drivers and pedestrians, reflecting a degree of callousness that might lead a person to later pull the trigger on a gun. *See id.* at 751-52. The offender's purposeful decision to do something that is inherently likely to lead to violent confrontation is an aggressive, violent act. *See id.* The court in *Begay* reasoned, as we did in *Spells,* that this combination of mental state and likelihood of confrontation with authorities is aggressive and violent because it is an invitation to, or acceptance of the potential violent outcome by the offender. *See Begay,* 128 S.Ct. at 1587-88; *Spells,* 537 F.3d at 752. This is true despite the fact that a

predicate offense may not *require* that an offender actually endanger others through his flight. The example crimes listed in § 924(e)(2)(B)(ii) also do not *require* that the offender put others in danger for conviction. *Begay,* 128 S.Ct. at 1586 (burglary only requires an unlawful entry into a building with the intent to commit a crime). However, resisting law enforcement and the enumerated crimes all create a likelihood of violent confrontation and are "purposeful, violent and aggressive."

While *Spells* did not explicitly address the "violent" part of *Begay's* "purposeful, violent and aggressive" test, *see Dismuke,* 593 F.3d 582, 593-94, its holding is good law and controls our case. In determining whether a felony violation of New Mexico's DUI statute was "violent and aggressive," the Supreme Court in *Begay* simply distinguished the conduct characterizing DUI with that characterizing the ACCA's enumerated offenses of burglary, arson, extortion and the use of explosives. *Begay,* 128 S.Ct. at 1586. While the enumerated offenses are characterized by purposeful, violent and aggressive conduct, and show an increased likelihood that an offender would later pull the trigger on a gun, the Court considered DUI more like a strict liability offense that does not present that increased likelihood. *Id.* at 1587. The Supreme Court elaborated no further on what constitutes the type of "violent" conduct required under the ACCA, other than providing examples of other strict liability offenses it thought were akin to DUI. *See id.* It is significant to note that none

of the example crimes the Court listed required mental culpability above recklessness or negligence. *See id.* (reckless polluting, negligent release of pollutants into sewer system, reckless tampering with consumer products and inattentive seamen who cause serious accidents). Similarly, we followed this framework in *Spells* when we distinguished Indiana's resisting law enforcement from DUI, and held that, unlike DUI, a person convicted of resisting law enforcement was much more likely to be someone labeled an "armed career criminal." *Spells,* 537 F.3d at 752-53. Furthermore, our holding in *Spells* is consistent with the Supreme Court's subsequent holding in *Chambers v. U.S.,* 129 S.Ct. 687, 691, 172 L.Ed.2d 484 (2009), that escape from custody is a violent felony under the ACCA, whereas a "crime of inaction," like failure to report to custody is not similarly purposeful, violent and aggressive. *Id.* at 692-93. A felony conviction for resisting law enforcement in Indiana is a crime of action more like escape than "failure to report," a crime of inaction. Its knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by choosing to continue driving rather than pull over. *See Spells,* 537 F.3d at 752. Thus *Spells* is still good law because it correctly applied *Begay's* "purposeful, violent and aggressive," requirement, and its reasoning has been implicitly affirmed in *Chambers.*

In the case at bar, Sykes urges us to overrule that holding and follow the Eleventh Circuit, which

held that the offense of fleeing from police in a vehicle is not a violent felony under ACCA. *United States v. Harrison,* 558 F.3d 1280, 1295 (11th Cir.2009). However, "[w]hile we carefully and respectfully consider the opinions of our sister circuits, we certainly do not defer to them." *Atchison, Topeka & Santa Fe Ry. Co. v. Pena,* 44 F.3d 437, 443 (7th Cir.1994) (quoting *Colby v. J.C. Penney Co., Inc.,* 811 F.2d 1119, 1123 (7th Cir.1987)). Stare decisis requires that we adhere to our previous holdings unless we feel "obliged to bring *[Spells']* opinion[ ] into line with experience and facts newly ascertained." *Vasquez v. Hillery,* 474 U.S. 254, 266, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 412, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)). The mere existence of *Spells* "becomes a reason for adhering to [its] holding[ ] in subsequent cases," *Midlock v. Apple Vacations W., Inc.,* 406 F.3d 453, 457 (7th Cir.2005), especially when those cases are directly on point, as here. While the doctrine is not rigid, it is also "not a noodle." *Bethesda Lutheran Homes & Serv's. v. Born,* 238 F.3d 853, 858 (7th Cir.2001). We need articulable reasons for overruling precedent – e.g. it might be unsound in principle or unworkable in practice. *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 546, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). On the other hand, when parties and/or citizens widely rely on a particular decision, the interests of stability, predictability and respect for the courts may counsel against overruling a particular case. *Hilton v. S.C. Pub. Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991).

We adhere today to our approach in *Spells* because it is neither unworkable nor unsound. First of all, this case is factually and legally indistinguishable from *Spells*. The categorical approach that guides this case prohibits us from considering anything other than the ACCA and the statutory language of the predicate offense. Our decision here rests upon the same underlying facts – a prior conviction under Ind.Code § 35-44-3-3(b)(1)(A) – and the same legal question: whether that prior conviction is a violent felony under the ACCA's residual clause. Unfortunately for Sykes, his is not a case involving "facts newly ascertained" nor an unsound or unworkable precedent, and he offers no reason for us to depart from precedent, save the existence of a contrary holding in *Harrison*. In fact, although the Eleventh Circuit in *Harrison* reached a different conclusion about whether a prior conviction for resisting law enforcement is a violent felony, that court followed the same categorical approach outlined in *Begay* that we followed in *Spells*. *See Harrison,* 558 F.3d at 1295. We simply reached different conclusions. This does not make the approach or the result unworkable. Additionally, unlike the Eleventh Circuit, the Fifth, Sixth and Tenth Circuits have all agreed with our reasoning in *Spells*. *See United States v. Harrimon,* 568 F.3d 531, 536 (5th Cir.2009); *United States v. Young,* 580 F.3d 373, 378 (6th Cir.2009); *United States v. West,* 550 F.3d 952, 971 (10th Cir.2008); *cf. United States v. Rivers,* 595 F.3d 558, 564-65 (4th Cir.2010) (South Carolina's fleeing statute is not a violent

felony because it criminalizes "a broad swath of unintentional conduct.").

We also note that our recent holding in *United States v. Woods,* 576 F.3d 400, 412-13 (7th Cir.2009), does not change our analysis of this case. In *Woods,* we addressed whether a prior conviction under Illinois involuntary manslaughter law was a violent felony for purposes of the ACCA. But *Woods* does not control our decision here. Our holding in that case turned on the fact that the mens rea required for a conviction of the predicate crime was recklessness, while the ACCA's residual clause only counts "purposeful" crimes as violent felonies. *Id.* at 412-13. In contrast, Ind.Code § 35-44-3-3(b)(1)(A) is a purposeful crime as we recognized in *Spells,* 537 F.3d at 752, and again in *Dismuke,* 593 F.3d 582, 590-92.

Finally, we reject the idea, raised in passing in Sykes' brief, that the district court erred in failing to make a factual finding that his underlying conviction was of the felony variety under Ind.Code § 35-44-3-3(b)(1)(A), rather than a conviction for a lesser crime under some other part of the statute. In *Woods,* we addressed the question of how to apply the categorical approach in situations where the statute is divisible, in that it punishes conduct that is a violent felony, as well as conduct that is not. 576 F.3d at 403-07. In such cases, we follow a modified categorical approach that permits the court to look at a limited set of additional materials in order to determine under which portion of the statute the defendant was convicted. *Id.* at 404-05 (quoting *United States v. Smith,* 544

F.3d 781, 786-87 (7th Cir.2008)). The court may look to a charging document, the terms of a plea agreement or transcript of a colloquy between the judge and defendant in which the factual basis for the plea was confirmed. Resort to these documents is only permitted for the limited purpose of properly categorizing the predicate offense by determining under which part of a divisible statute a defendant was convicted. The court may not consider the "particular facts underlying the defendant's conviction." *Id.* at 404. Even assuming Sykes properly preserved and raised this issue, (which he did not), *Woods* is not applicable because there is no doubt as to which portion of Indiana's statute that Sykes was convicted because it was separately numbered and was clearly identified in the PSR. The PSR stated that Sykes' conviction was for the Class D felony variety of resisting law enforcement under Ind.Code § 35-44-3-3(b)(1)(A), and provided the factual basis for the conviction. This particular portion of the statute is not divisible. It can only be violated when a person "knowingly or intentionally . . . flees from a law enforcement officer after the officer has . . . identified himself or herself and ordered the person to stop . . . and the person uses a vehicle to commit the offense. . . ." Ind.Code § 35-44-3-3(b)(1)(A). Sykes did not object to the PSR in the district court and therefore waived any such argument here unless he can show plain error. *United States v. Caban,* 962 F.2d 646, 650 (7th Cir.1992). *See also* Fed.R.Crim.P. 32(i)(3)(A) (district court "may accept any undisputed portion of the presentence report as a finding of fact").

We find no error here plain or otherwise, not only because Sykes provides no reasons to support such a finding, but because he essentially admitted to the felony conviction at sentencing. *See* Tr. of Sentencing at 4, *United States v. Sykes,* 1:08-CR-95 (S.D.Ind. Oct. 8, 2008). When asked by the district court if he had any objections to the PSR, Sykes' attorney did not object to the characterization of the prior conviction as being under Ind.Code § 35-44-3-3(b)(1)(A). He only objected to characterization of Sykes' prior conviction as a violent felony under the ACCA, so that he could pursue that argument on appeal. The issue is waived.

III. CONCLUSION

For the reasons set forth above, fleeing police in a vehicle in violation of Ind.Code § 35-44-3-3(b)(1)(A) is sufficiently similar to ACCA's enumerated crimes in kind, as well as the degree of risk posed, and counts as a violent felony under ACCA. We affirm.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

September 28, 2010

Mr. William E. Marsh
Indiana Federal Community Defenders, Inc.
111 Monument Circle
Suite 752
Indianapolis, IN 46204-5173

Re: Marcus Sykes
v. United States
No. 09-11311

Dear Mr. Marsh:

The Court today entered the following order in the above-titled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

No. 09-11311

In The Supreme Court of the United States

♦

MARCUS SYKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

♦

BRIEF OF THE PETITIONER

♦

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QUESTION PRESENTED

Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 598 F.3d 334 (7th Cir. 2010) and is reproduced in the Joint Appendix Volume I (hereinafter I J.A.) at 27.

Mr. Sykes was sentenced in the United States District Court for the Southern District of Indiana on October 8, 2008, and judgment was entered on October 14, 2008. *United States v. Sykes*, 1:08-CR-95 LJM/KPF (S.D. Ind. Oct. 14, 2008).

♦

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on March 12, 2010, and amended the opinion on March 22, 2010, to correct a technical error.[1] Petitioner timely filed his petition for writ of certiorari on June 9, 2010, and the Court granted the petition on September 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

♦

[1] The amended opinion corrected the description of a person subject to the Armed Career Criminal Act as being a person previously "convicted of two or more violent felonies" to read "convicted of three or more violent felonies." *See Sykes*, 598 F.3d at 335.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions – the Sixth Amendment to the Constitution, 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e), and Ind. Code § 33-44-3-3 (2003) – are reproduced in an appendix at the end of this brief.

♦

STATEMENT OF THE CASE

Marcus Sykes pled guilty in 2008 in federal court to possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). I J.A. 1 (Docket # 26). Ordinarily, this offense is punishable by a term of imprisonment not to exceed ten years. 18 U.S.C. § 924(a)(2). Where, however, a defendant has three qualifying convictions for a "violent felony" or "serious drug offense," the penalty increases to a minimum of fifteen years under the Armed Career Criminal Act (hereinafter ACCA), 18 U.S.C. § 924(e). The ACCA defines "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Mr. Sykes had two prior convictions that unquestionably qualified as ACCA predicates. Presentence Investigation Report, Joint Appendix Vol. II Under Seal (hereinafter II J.A.) 5. For the third offense, the Presentence Investigation Report listed a 2003 Indiana conviction for resisting law enforcement. *Id.* This conviction was sustained under Indiana Code § 35-44-3-3. *United States v. Sykes*, 598 F.3d 334, 335 (7th Cir. 2010), I J.A. 28. Section (a)(3) of that statute makes it a crime to:

> knowingly or intentionally . . . flee[ ] from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop. . . .

Ind. Code § 35-44-3-3(a)(3). Normally, the (a)(3) offense constitutes a Class A misdemeanor under Indiana law. *Id.* However, it is enhanced to a "Class D felony if . . . the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A). Mr. Sykes was convicted under this subsection of using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop. He was not convicted of the distinct crime of operating a

vehicle in a manner that creates a substantial risk of bodily injury while fleeing, which is separately punishable as a felony under § 35-44-3-3(b)(1)(B). That provision applies to all the offenses in subsection (a) of the statute, if, "while committing [the] offense . . . , the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." Ind. Code § 35-44-3-3(b)(1)(B).

Mr. Sykes objected to the application of the enhanced penalty provision of the ACCA. II J.A. 20. He acknowledged that the Seventh Circuit's decision in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009), held that a conviction for fleeing a law enforcement officer in a vehicle under Indiana Code § 35-44-3-3(b)(1)(A) was a "violent felony." *Id.* He argued, however, that the *Spells* decision was contrary to current Supreme Court law. *Id.* The district court overruled the objection, finding that Mr. Sykes's conviction qualified as a violent felony. I J.A. 13-14. The court sentenced Mr. Sykes to 188 months of incarceration pursuant to the enhanced penalty provisions of the ACCA and U.S.S.G. § 4B1.4. I J.A. 1 (Docket # 28); *id.* at 24 (sentencing transcript).

Mr. Sykes appealed from the district court's ruling. He asked the United States Court of Appeals for the Seventh Circuit to reconsider its decision in *Spells* in light of this Court's recent decision in *Chambers v. United States*, 129 S. Ct. 687 (2009), as

well as the circuit court decisions in *United States v. Harrison*, 558 F.3d 1280, 1296 (11th Cir. 2009), and *United States v. Tyler*, 580 F.3d 722, 726 (8th Cir. 2009), which held that state statutes essentially identical to Indiana Code § 35-44-3-3(a)(3) and (b)(1)(A) were not violent felonies under the ACCA. I J.A. 33-34. The court of appeals acknowledged that *Spells* was in conflict with *Harrison*, I J.A. 35, but declined to overrule *Spells* and affirmed Mr. Sykes's classification as an armed career criminal and the 188-month sentence, I J.A. 38.

•

SUMMARY OF ARGUMENT

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides enhanced sentences for defendants who have three convictions for violent felonies. This case concerns the application of the ACCA's definition of "violent felony" as an offense punishable by more than one year of imprisonment that is "burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). This Court has explained that the "otherwise" clause of § 924(e)(2)(B)(ii) looks back to the enumerated violent crimes in the definition – burglary, arson, extortion, and explosives offenses – and encompasses "only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Begay v. United States*, 553 U.S. 137, 142 (2008). An offense is

similar to the enumerated crimes if it is "roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 143. Under *Begay*, crimes that qualify as similar under the "otherwise" clause "all typically involve purposeful, 'violent' and 'aggressive' conduct." *Id.* at 144-45.

The Indiana offense of which Mr. Sykes was convicted did not involve violent, aggressive conduct. Mr. Sykes was convicted of felony resisting arrest by fleeing in a motor vehicle from a police officer who had ordered him to stop. Ind. Code § 35-44-3-3(a)(3) and (b)(1)(A). In determining whether this crime fits within the "otherwise" clause, the Court must look to "conduct encompassed by the elements of the offense, in the ordinary case[.]" *James v. United States*, 550 U.S. 192, 208 (2007). The elements of Mr. Sykes's offense require only that one who is driving decline to heed an order to stop – no more. These elements plainly do not encompass violent or aggressive conduct; this is confirmed by the existence of a separate provision under the same Indiana statute punishing flight from a law enforcement officer that creates a substantial risk of bodily injury to another person. Ind. Code § 35-44-3-3(b)(1)(B). While this separate flight offense could arguably qualify as a violent felony under § 924(e)(2)(B)(ii) and *Begay*, the two offenses are distinct, and, as the Court explained in *Chambers v. United States*, 129 S. Ct. 687, 690 (2009), it is important to keep offenses in their proper categories in making ACCA determinations. The specific Indiana flight offense of which Mr. Sykes

was convicted falls outside the category of violent, aggressive offenses, and thus falls outside the ACCA.

The Seventh Circuit, in ruling that Mr. Sykes's Indiana offense was a violent felony, is in conflict with this Court's teachings. Instead of looking to see if the conduct encompassed by the statute was purposeful, violent, *and* aggressive, as *Begay* instructs, the Seventh Circuit conflated violence and aggressiveness with mere purposefulness, concluding that a defendant's "purposeful decision to do something that is inherently likely to lead to violent confrontation is an aggressive, violent act." *Sykes*, 598 F.3d at 336. Instead of looking to see what conduct the specific offense of conviction encompassed, as *James* instructs, the court engaged in conjecture about what might happen after the occurrence of the statutorily required conduct. Instead of using the statutory categories, as *Chambers* instructs, the court blurred them, evaluating Mr. Sykes's Indiana flight offense as if the elements of the different Indiana offense of flight creating a substantial risk of injury applied. The court of appeals speculated that Mr. Sykes's flight offense might conceivably cause some risk of injury even though he was expressly not convicted of the separate risk-of-injury offense. This Court's precedent does not permit speculation beyond the actual offense of conviction. Indeed, such speculation invites the sort of extra-element fact-finding that, as this Court has noted, would raise serious constitutional concerns under the Sixth Amendment. *James*, 550 U.S. at 214.

The Indiana offense of which Mr. Sykes was convicted is neither similar in kind nor in degree of risk posed to burglary, arson, extortion or explosives crimes. It is not a violent or aggressive offense, and thus is not a violent felony within the meaning of the "otherwise" clause of § 924(e)(2)(B)(ii). Mr. Sykes could not be subjected to the increased punishment of the ACCA. The Seventh Circuit's decision must be reversed, and Mr. Sykes's sentence should be vacated.

♦

ARGUMENT

THE INDIANA OFFENSE OF SIMPLE VEHICULAR FLEEING IS NOT A VIOLENT FELONY UNDER THE ACCA.

The Armed Career Criminal Act increases the maximum and minimum prison terms for persons convicted of illegally possessing firearms or ammunition if they have three previous convictions for a "violent felony." 18 U.S.C. § 924(e). The violent felony definition has two components. First, a conviction may qualify as a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Second, a conviction may qualify if it is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Only the final part of the definition is at issue here: Mr. Sykes's offense has no element of physical force, and it is not

burglary, arson, extortion, or an explosives offense. Accordingly, it can qualify as an ACCA predicate only if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.*

Using the "categorical approach" developed in *Taylor v. United States*, 495 U.S. 575 (1990), this Court makes the determination whether a previous conviction is a "violent felony" by "examin[ing] it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 553 U.S. at 141. In *James v. United States*, 550 U.S. 192 (2007), this Court explained that "the proper inquiry is whether *the conduct encompassed by the elements of the offense*, in the ordinary case, presents a serious potential risk of injury to another." *Id.* at 208 (emphasis added). When the elements of Mr. Sykes's offense are considered, they do not meet this test. To qualify as an ACCA predicate under the "otherwise" clause, a prior offense must be "roughly similar in kind as well as in degree of risk posed" to burglary, arson, extortion, and use of explosives. *Begay*, 553 U.S. at 143. Mr. Sykes's offense is neither.

A. Simple Vehicular Fleeing Is Not Similar in Kind to Burglary, Arson, Extortion or Explosives Offenses.

To be similar in kind to the offenses enumerated in 18 U.S.C. § 924(e)(2)(B)(ii), a crime must involve

purposeful, violent, and aggressive conduct. *Begay*, 553 U.S. at 144-45; *see also Chambers v. United States*, 129 S. Ct. 687, 692 (2009) (failure to report not violent felony because it "amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct" at issue in ACCA's enumerated offenses) (internal quotation marks omitted). As both the text and the history of the statute made clear, mere risk is not enough. *Begay*, 553 U.S. at 143-44. Thus, even an offense like driving under the influence, which the Court assumed to "present a serious potential risk of physical injury to another," could not rise to the level of a "violent felony" under the ACCA because it was "simply too unlike the provision's listed examples." *Begay*, 553 U.S. at 142.

Like driving under the influence, vehicular fleeing as defined in Indiana Code § 35-44-3-3(b)(1)(A) is simply too unlike the listed offenses to be a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). The elements of the offense are that the defendant (1) knowingly or intentionally (2) fled from a law enforcement officer after the officer identified himself and ordered him to stop, and (3) used a vehicle in fleeing. *Woodward v. State*, 770 N.E.2d 897, 901 (Ind. App. 2002). In *Woodward*, the Indiana Court of Appeals rejected the defendant's contention that the court should "graft onto [§ 35-44-3-3(b)(1)(A)] the requirement that the flight be more than merely failing to stop." *Id.* This Court is bound by the state court's "interpretation of state law, including its determination of the elements." *Johnson v. United States*, 130 S. Ct.

1265, 1269 (2010). These elements do not meet the test set out in *Begay*.

A violation of § 35-44-3-3-(b)(1)(A) may be considered "purposeful" to the extent that it requires proof of knowledge or intent.[2] But not all purposeful crimes are "aggressive" and "violent" so as to qualify as ACCA predicates. For example, the crime at issue in *Chambers* (failure to report to a penal institution) required the same mens rea element, "knowingly," as the crime at issue here, yet this Court recognized that it was not sufficiently aggressive or violent to constitute a "violent felony." 129 S. Ct. at 691-92.

The Seventh Circuit's decision ignored this Court's teachings by construing a purposeful act alone to be sufficient to qualify the vehicular fleeing offense as a "violent felony." As the Seventh Circuit put it, "[t]he offender's purposeful decision to do something that is inherently likely to lead to violent confrontation is an aggressive, violent act," *United States v. Sykes*, 598 F.3d 334, 336 (7th Cir. 2010), I J.A. 31, and "this combination of mental state and likelihood of confrontation with authorities is

[2] Circuit Judge Richard Posner has recently offered an alternative interpretation. In *United States v. Welch*, 604 F.3d 408 (7th Cir. 2010), the court followed *Sykes* in holding that "aggravated fleeing" is a "violent felony." In his dissent, Judge Posner said, "'purposeful' should be interpreted to mean trying to harm a person's person or property, which is characteristic of the enumerated crimes." *Id.* at 434. Such analysis would foreclose the result reached by the court of appeals in Mr. Sykes's case.

aggressive and violent because it is an invitation to, or acceptance of the potential violent outcome by the offender." *Id.* at 337.

The Seventh Circuit's speculation as to the possible future consequences of the offense improperly expanded upon the elements. The elements of the Indiana offense of which Mr. Sykes was convicted do not encompass conduct that presents a serious potential risk of physical injury to another. Yet the court of appeals held that a district court could base an enhanced sentence on its findings that the "typical" commission of the offense would present such a risk, though the statute did not require or even contemplate it. *Sykes*, 598 F.3d at 335-36. This holding reads the § 924(e) "otherwise" clause as allowing a federal sentencing court to find conduct relating to the state offense that is outside the definition of the offense.

This Court rejected this approach in *James*. The *James* Court made clear that, in assessing whether an offense qualified under § 924(e)'s "otherwise" clause, the federal courts could consider only the conduct encompassed by the elements of the offense. 550 U.S. at 208. This rule was necessary to safeguard the Sixth Amendment right that any factual determination that increases a maximum statutory sentence must be proven to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. *See James*, 550 U.S. at 214 (rejecting Sixth Amendment challenge); *see generally Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Seventh Circuit's approach ignores the *James* rule and revives the

serious constitutional problems posed by § 924(e)'s "otherwise" clause. This Court has long recognized that an interpretation that creates a serious question regarding a statute's constitutionality should be rejected if the statute can fairly be read in a way that avoids the constitutional doubt. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). The Seventh Circuit's reading violates this venerable rule.

The Seventh Circuit's speculation also improperly expanded the time frame of the offense. As this Court explained in *Chambers*, the "relevant time" under the "otherwise" clause of § 924(e)(2)(B)(ii) is the time the crime is committed, not the aftermath of the crime. 129 S. Ct. at 692 ("While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury."). The Indiana vehicular fleeing offense is complete when the person fails to stop after a police officer has identified himself and ordered the person to stop. State precedent makes this clear. In *Swain v. State*, No. 02A03-0908-CR-387, 2010 WL 623720 (Ind. App. Feb. 23, 2010) (unpublished opinion), for example, the court upheld a conviction, under Indiana Code § 35-44-3-3(b)(1)(A), of a defendant who drove for 10 or 15 seconds after a person being chased on foot by police officers jumped into her car. *See id.* at *2. In *Woodward v. State*, 770 N.E.2d 897 (Ind.

App. 2002), the defendant testified that when he became aware of the officer's lights and siren, he did not stop immediately but waited until he came to "a clear, well-lighted place to stop where there would be someone who knew him." *Id.* at 901. In affirming his conviction, the Indiana Court of Appeals said, "we cannot say that a person who has admitted to knowing that a police officer wishes to effectuate a traffic stop can, without adequate justification, choose the location of the stop." *Id.* at 902. Since the element of flight under (b)(1)(A) is no "more than merely failing to stop," *id.* at 900, there is no basis for inferring that any aftermath, let alone a violent one, is an intrinsic component of the offense.

Finally, the Seventh Circuit's ruling is particularly inapt in light of the other provisions of the statute under which Mr. Sykes was convicted. That statute expressly makes a distinction between the simple vehicular fleeing offense under Indiana Code § 35-44-3-3(b)(1)(A) and the offense under § 35-44-3-3(b)(1)(B), which includes as an element "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person." This element is indistinguishable from the language of the "otherwise" clause of § 924(e)(2)(B)(ii).[3] The Seventh Circuit

[3] The Seventh Circuit has held that a conviction under Indiana Code § 35-44-3-3(b)(1)(B) is a "crime of violence" under the definition of that term in U.S.S.G. § 4B1.2. *United States v. Jennings*, 544 F.3d 815, 820 (7th Cir. 2008). The definition of "crime of violence" in U S.S.G. § 4B1.2 is nearly identical to the

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expressly held that Mr. Sykes was convicted of the § 35-44-3-3(b)(1)(A) offense. *Sykes*, 598 F.3d at 336, I J.A. 30. Yet despite the express absence of any risk element in Mr. Sykes's offense, the court of appeals held it to be an ACCA predicate.

Unlike the Seventh Circuit, the Eleventh Circuit has shown the proper respect for the statutory structure created by a state legislature when holding that a violation of the Florida fleeing statute,[4] which is essentially identical to the Indiana statute, is not a "violent felony." *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). As that court said, "[o]ur 'categorization' of the crime here, as it is ordinarily committed, reflects the Florida legislature's decision to differentiate between very different types of fleeing behavior." *Id.* at 1293. Similar differentiations are made in Indiana, where other subsections of the statute of Mr. Sykes's conviction expressly include, as elements, even more serious consequences of fleeing, including injury or death. *See, e.g.*, Ind. Code § 35-44-3-3(b)(2), (b)(3). The presence of these crimes make it even clearer that Mr. Sykes's crime is not of the sort that can qualify as an ACCA predicate.

definition of "violent felony" in 18 U.S.C. § 924(e). *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008).

[4] The Florida statute provides in relevant part: "Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree. . . ." Fla. Stat. § 316.1935(2).

Even if one assumes that the crime of failing to stop for a police officer, like failing to report to serve a sentence, is motivated by a desire to avoid detention by law enforcement authorities, that motivation still does not render the offense similar in kind to the ACCA's enumerated offenses. In *Chambers*, the Court rejected the government's argument that a failure to report to serve a sentence demonstrated a "special, strong aversion to penal custody" as "beside the point." 129 S. Ct. at 692. The Court said that even assuming "the relevance of violence that may occur long after an offender fails to report, . . . the question is whether such an offender is significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" *Id.* at 692. That question was answered in the negative in *Chambers*; the same answer must be given here.

B. The Government Failed to Show That the Risk of Harm in Simple Vehicular Fleeing Is Similar in Degree to the Risk Posed by Burglary, Arson, Extortion or Explosives Offenses.

Because simple vehicular fleeing is not violent and aggressive, the offense is not similar in kind to the offenses enumerated in § 924(e)(2)(B)(ii), and thus is not a violent felony under the ACCA. On that basis alone, this Court should reverse the Seventh Circuit's contrary judgment. That nothing in the record shows that the offense posed sufficient risk to qualify as an

ACCA predicate provides an additional reason for reversal. *Cf. Chambers*, 129 S. Ct. at 691 (relying on empirical data in holding that failure to report to penal institution was not "violent felony"). The government did not present the district court or the court of appeals with any empirical data regarding the risk of injury created by a violation of Indiana Code § 35-44-3-3(b)(1)(A). The burden was on the government to prove that the ACCA penalty enhancement applied to Mr. Sykes. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975) (due process requires prosecutor to prove absence of heat of passion before court can impose higher sentence for homicide); *see also Chambers*, 129 S. Ct. at 693 (describing statistics from the U.S. Sentencing Commission and finding for the defense, in part because "the Government provides no other empirical information"); *Harrison*, 558 F.3d at 1299 (holding that government has burden to prove that prior offense is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii)). The government did nothing to meet that burden.[5]

[5] The concurring and dissenting opinions in *Begay* offered competing versions of a statistical approach in "otherwise" clause cases. *Compare Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment) (the *ratio* between incidents of harm and the number of incidents of the offense must be as high as the ratio associated with the least risky enumerated offense) *with* 553 U.S. at 156 & nn.2-3 (Alito, J., dissenting) (large number of injuries resulting from conduct underlying offense sufficient to establish "serious potential risk of injury") Neither approach need be considered here, as the government has presented no data whatsoever This is hardly surprising, since, in the unlikely

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In the absence of empirical data demonstrating the potential risk of physical injury, courts are left with simple "conjecture as to the possible danger of physical injury[.]" *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) (Posner, J.), *rev'd*, 129 S. Ct. 687 (2009). Conjecture, this Court taught in rejecting the government's risk arguments in *Chambers*, cannot be enough to demonstrate the type of risk required by § 924(e)(2)(B)(ii). Because conjecture cannot demonstrate the risk involved in the § 35-44-3-3(b)(1)(A) offense, the government cannot show that the offense is similar in degree of risk to that of burglary, arson, extortion, or use of explosives. Accordingly, it was error to treat the offense as a violent felony and to enhance Mr. Sykes's sentence.[6]

•

event that the annual number of injuries and the annual number of incidents of vehicular fleeing could be determined, the number of injuries attributable to violations of Indiana Code § 35-44-3-3(b)(1)(A) would likely be zero. Offenses involving such injuries would undoubtedly be charged under the other subsections of the statute that specifically contain risk of injury, injury, or death as an element. *See, e.g.*, Ind. Code § 35-44-3-3(b)(1)(B), (b)(2), and (b)(3).

[6] In the event that the Court finds it ambiguous whether § 924(e)(2)(B)(ii) was meant to encompass crimes like Mr. Sykes's, the rule of lenity requires that the statute be interpreted in his favor. *See Hughey v. United States*, 495 U.S. 411, 422 (1990); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (applying rule of lenity to federal statute that would enhance penalty).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924 provides in relevant part:

> (a)(1) Except as otherwise provided . . .
>
> (2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both
>
> * * *
>
> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

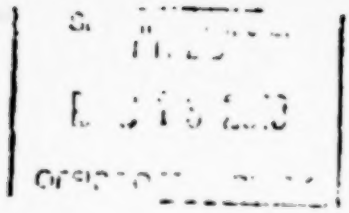
Ind. Code § 35-44-3-3 (2003) provided in relevant part:

> (a) A person who knowingly or intentionally:
>
> (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;
>
> (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or
>
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop; commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).
>
> (b) The offense under subsection (a) is a:
>
> (1) Class D felony if:
>
> (A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or
>
> (B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;
>
> (2) Class C felony if, while committing any offense described in subsection (a), the person

operates a vehicle in a manner that causes serious bodily injury to another person; and

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person.

RESPONDENT'S BRIEF



No. 09-11311

In the Supreme Court of the United States

MARCUS SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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Powell v. *United States*, 430 F.3d 490 (1st Cir. 2005), cert. denied, 547 U.S. 1047 (2006) 42
Sanders v. *City of Union Springs*, 207 Fed. Appx. 960 (11th Cir. 2006) 14
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United States v. *Hughes*, 602 F.3d 669 (5th Cir. 2010), petition for cert. pending, No. 10-5289 (filed July 6, 2010) 29

United States v. *Kendrick*, 423 F.3d 803 (8th Cir. 2005) 32

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United States v. *McConnell*, 605 F.3d 822 (10th Cir. 2010) 42

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United States v. *Pearson*, 553 F.3d 1183 (8th Cir. 2009) 29

United States v. *Rogers*, 594 F.3d 517 (6th Cir. 2010), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010) 31, 48

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United States v. *Willings*, 588 F.3d 56 (1st Cir. 2009) ... 29

United States v. *Young*, 580 F.3d 373 (6th Cir. 2009), cert. denied, 130 S. Ct. 1723 (2010) 30

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Welch v. *United States*, 604 F.3d 408 (7th Cir. 2010), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010) 26, 28, 32
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18 U.S.C. 81 37
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United States Sentencing Guidelines:
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Miscellaneous:

Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. Crim. L. & Criminology 521 (1989) ... 12, 13
Geoffrey P. Alpert et al., *Policing: Continuity and Change* 194 (2006) 19

Miscellaneous—Continued: Page

Kenneth L. Bayless & Robert Osborne, *A Report by the Pursuit Management Task Force* (1998) 12

Shannon Catalano, *Victimization During Household Burglary* (Sept. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/vdhb.pdf 21, 22

Justin Fenton, *Woman Killed During Pursuit Identified*, Baltimore Sun, July 27, 2010 14

Mike Gangloff, *Man Gets Life Sentence In Deadly New Year's Burglary*, Roanoke Times, May 28, 2010 38

Maurice J. Hannigan & Kerri A. Hawkins, *Evaluation of Risk: Initial Cause vs. Final Outcome in Police Pursuits* (1995) 12

Caroline Wolf Harlow, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* (Nov. 2001), http://www.ojp.usdoj.gov/content/pub/pdf/fuo.pdf 32

Peter Hermann, *Attempt to Elude Police Ends in Fiery Four-Car Crash*, Baltimore Sun, Oct. 12, 2010 20

H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, 11 Prehospital Emergency Care 278 (2007) 18

Freeman Klopott, *Crash During Police Chase Kills Father of Four*, Washington Examiner, Nov. 22, 2010 14

3 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 38

Miscellaneous—Continued: Page

James Lindgren, *Blackmail and Extortion in* 1 *Encyclopedia of Crime and Justice* (Joshua Dressler ed., 2d ed. 2002) 38

Ernesto Londono & Debbi Wilgoren, *Md. Crash Came After High Speed D.C. Chase*, Washington Post, Dec. 5, 2006 20

Cynthia Lum & George Fachner, *Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database* (2008) 12, 19

National Ctr. for Statistics & Analysis, *Fatalities in Motor Vehicle Crashes Involving Police in Pursuit* (2010) 17, 18

Office of Strategic Intelligence & Info., Bureau of Alcohol, Tobacco, Firearms & Explosives, *Explosive Incident Data: Years: 2004, 2005, 2007, 2008* (2010) 22

Lisa Rein & James Hohmann, *Crashes, Injuries Left in Wake of Pr. George's Baltimore Chase*, Washington Post, Nov. 22, 2009 14

Fred P. Rivara & C.D. Mack, *Motor Vehicle Crash Deaths Related to Police Pursuits in the United States*, 10 Injury Prevention 93 (2004) 18

Phillip Rucker, *Girl, 2, Dies After Man Hits Car, Runs*, Washington Post, Oct. 22, 2007 20

Brigid Schulte, *Car Theft Suspect Hits 4 Vehicles, Including Cruisers*, Washington Post, Sept. 24, 2007 14

U.S. Fire Admin., *Arson in the United States*, 1 Topical Fire Research Series (Jan. 2001), http://www.usfa.dhs.gov/downloads/pdf/tfrs/vli8-508.pdf 21

Miscellaneous—Continued: Page

L. Edward Wells & David N. Falcone, *Research on Police Pursuits: Advantages of Multiple Data Collection Strategies*, 20 Policing Int'l J. Police Strategy & Mgmt. 729 (1997) 19

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (1 J.A. 27-38) is reported at 598 F.3d 334.

JURISDICTION

The judgment of the court of appeals as amended was entered on March 22, 2010. The petition for a writ of certiorari was filed on June 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Indiana, petitioner

was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. I J.A. 27-38.

1. On March 11, 2008, petitioner brandished a firearm while attempting to rob two people who were sitting in a parked car outside of a liquor store in Indianapolis, Indiana. During his robbery attempt, petitioner recognized one of the people in the vehicle and aborted his attempt. A short time later, as the victims were speaking to police officers, they saw petitioner walking across a nearby street. Officers approached petitioner, who withdrew a black revolver from his pocket and tossed it on the ground. Officers then arrested petitioner. I J.A. 28; II J.A. 3-4.

2. On July 22, 2008, petitioner pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). I J.A. 27-28. On that count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that pres-

ents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

At the sentencing hearing, petitioner did not dispute that two of his prior convictions under Indiana law for robbery qualified as violent felonies for ACCA purposes. See I J.A. 8-9 ("We acknowledge that those [prior robbery convictions] serve as predicates for the ACCA."); II J.A. 5, 9-10; Pet. C.A. Br. 3 & n.1. Petitioner did dispute, however, whether a third prior conviction qualified as an ACCA violent felony: his conviction in June 2003 under Indiana Code § 35-44-3-3(b)(1) (Supp. 2001) for intentional vehicular flight from a law enforcement officer. See I J.A. 9; II J.A. 11.[1] At the time of petitioner's vehicular flight offense, Section 35-44-3-3(a)(3) of the Indiana Code made it a crime to "knowingly or intentionally * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop," and Section 35-44-3-3(b)(1)(A) elevated that crime to a felony if "the person uses a vehicle to commit the offense."[2]

[1] According to petitioner's Presentence Investigation Report, on May 30, 2002, police officers saw petitioner operating a vehicle at night in Lawrence, Indiana, with no headlights and heavy front end damage. Police activated their emergency equipment and attempted a traffic stop, but petitioner fled in his vehicle. Petitioner then led police on a chase, during which he drove on the wrong side of the road, wove through traffic, and drove through the yards of two residences before striking the rear of a third residence with his vehicle. There were people standing in those yards at the time. Petitioner fled on foot and was subsequently arrested. See II J.A. 11.

[2] The current version of the Indiana statute that appears in the appendix to petitioner's brief differs slightly from the version in effect in May 2002 when petitioner committed his vehicular flight offense. Those differences are not material to the question presented in this

Petitioner acknowledged before the district court that, under binding circuit precedent, his prior Indiana conviction for intentional vehicular flight was a violent felony. I J.A. 9. The district court therefore sentenced petitioner as an armed career criminal. Based on petitioner's total offense level of 31 and his criminal history category of VI, petitioner's advisory Guidelines range was 188 to 235 months of imprisonment. *Id.* at 14. After consideration of the factors in 18 U.S.C. 3553(a), the district court sentenced petitioner to a term of 188 months of imprisonment, to be followed by five years of supervised release. I J.A. 22-24.

3. The court of appeals affirmed. I J.A. 27-38. Relying on its earlier decision in *United States* v. *Dismuke*, 593 F.3d 582 (2010), petition for cert. pending, No. 10-109 (filed July 19, 2010), it held that "the act of fleeing an officer in a vehicle involves a 'serious potential risk of physical injury' to others." I J.A. 31 (quoting 18 U.S.C. 924(e)(2)(B)(ii)). The court further held, in reliance on its previous decision in *United States* v. *Spells*, 537 F.3d 743 (2008), cert. denied, 129 S. Ct. 2379 (2009), that "resisting law enforcement in a vehicle under Indiana law typically involves conduct that is 'purposeful, violent[,] and aggressive' such that there is an increased likelihood that the 'offender is the kind of person who would deliberately point [a] gun and pull the trigger.'" *Ibid.* (quoting *Spells*, 537 F.3d at 751-752) (second set of brackets in original).

The court of appeals reasoned that "Indiana's resisting statute criminalizes flight that is done 'knowingly

case. Except as otherwise noted, all references in this brief to Indiana Code § 35-44-3-3 are to the 2001 Supplement, which was the version in effect at the time of petitioner's offense. Both versions of the Indiana statute appear in an appendix to this brief. See App., *infra*, 2a-6a.

[or] intentionally,' which satisfies the requirement that the conduct be purposeful." I J.A. 31. "In addition," the court observed, "besides daring a cop to endanger himself by giving chase, the act of fleeing police in a vehicle typically creates a risk of harm to other drivers and pedestrians, reflecting a degree of callousness that might lead a person to later pull the trigger on a gun." *Ibid.* The court noted that vehicular flight from law enforcement is violent and aggressive conduct "despite the fact that a predicate offense may not require that an offender actually endanger others through his flight," because the ACCA's enumerated crimes "also do not require that the offender put others in danger for conviction." *Id.* at 31-32 (emphasis omitted).

Moreover, the court of appeals held that *Spells* was consistent with this Court's intervening decision in *Chambers* v. *United States*, 129 S. Ct. 687 (2009). According to the court of appeals, this Court held in *Chambers* "that escape from custody is a violent felony under the ACCA, whereas a 'crime of inaction,' like failure to report to custody[,] is not similarly purposeful, violent and aggressive." I J.A. 33. The court of appeals reasoned that the Indiana offense of vehicular flight is "a crime of action: * * * [i]ts knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by choosing to continue driving rather than pull over." *Ibid.* The court noted that although there is conflict among the circuits, the majority of circuits likewise has concluded that vehicular flight from law enforcement is a violent felony under the ACCA. *Id.* at 35-36.

SUMMARY OF ARGUMENT

To qualify as a "violent felony" under the ACCA's residual clause, an offense must satisfy a two-part test: first, the offense must create a potential risk of physical injury to others that is comparable in degree to the risk created by the ACCA's enumerated crimes. See *James* v. *United States*, 550 U.S. 192, 206-209 (2007). Second, the offense must be similar in kind to the enumerated crimes, in that it must involve purposeful, violent, and aggressive conduct. See *Begay* v. *United States*, 553 U.S. 137, 142-148 (2008); *Chambers* v. *United States*, 129 S. Ct. 687, 692 (2009). Vehicular flight from police satisfies both parts of that test.

A. Vehicular flight from police creates a risk of injury to others that is comparable in degree to the risk created by the ACCA's enumerated crimes. Like the enumerated crime of burglary, vehicular flight creates a serious potential risk of a violent confrontation, except that the risk is even greater because the flight necessarily occurs in the presence of a law enforcement officer who is likely to be armed and to take quick action to pursue and detain the offender. Case law, media reports, and statistical data all confirm that, faced with the prospect of pursuit, a fleeing offender typically uses violent force to elude police. In addition, when police pursue a fleeing offender, the ensuing chase only increases the risk of physical injury to others. Vehicular flight thus places the lives and safety of law enforcement officers, innocent passengers, other motorists, and pedestrians in serious danger.

B. Vehicular flight also is similar in kind to the ACCA's enumerated crimes, because it involves purposeful, aggressive, and violent conduct. Unlike the New Mexico offense of driving under the influence that

was at issue in *Begay*, the Indiana offense of vehicular flight requires knowing or intentional conduct. And unlike the Illinois offense of failure to report for penal confinement that was at issue in *Chambers*, vehicular flight is not a passive crime, because it involves deliberate action to evade the police. Evasion of police is violent both in nature (because it inherently involves a confrontation with police) and in practice (because offenders typically endanger others as they flee). Statistical data and common sense confirm that an offender who not only has disregarded an officer's order to stop but also has actively chosen to flee in a motor vehicle is the type of career criminal who would have a greater propensity to use a firearm to harm others.

C. Contrary to petitioner's arguments, the court of appeals employed this Court's categorical approach to the ACCA's residual clause. The court of appeals correctly determined that the conduct encompassed by the Indiana offense of vehicular flight, in the ordinary case, creates a serious potential risk of injury to others. As part of that determination, the court properly considered potential violence that occurs during pursuit or capture, because vehicular flight is a continuing offense that is ongoing so long as the offender is in flight from police. Nor does it matter if a State elects to create greater or additional offenses for different types of vehicular flight. The necessary inquiry is into the potential risks typically created by conduct that constitutes vehicular flight, regardless of whether that conduct in some circumstances could be prosecuted as a greater or different offense.

ARGUMENT

PETITIONER'S CONVICTION FOR VEHICULAR FLIGHT FROM A LAW ENFORCEMENT OFFICER IS A "VIOLENT FELONY" UNDER THE ARMED CAREER CRIMINAL ACT

The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another," or "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Petitioner's conviction for vehicular flight from a law enforcement officer, in violation of Indiana Code § 35-44-3-3(b)(1), qualifies as a "violent felony" under that definition because it "otherwise involves conduct that presents a serious potential risk of physical injury to another."

To qualify under that residual clause, an offense must satisfy a two-part test: first, the offense must create a potential risk of physical injury to others that is "serious." That requirement means that the offense must create a risk comparable in degree to the risk created by the enumerated crimes. See *James* v. *United States*, 550 U.S. 192, 206-209 (2007). Second, the offense must be similar in kind to the specifically enumerated crimes—burglary, arson, extortion, or crimes involving the use of explosives. That requirement means that the offense must be "purposeful, violent, and aggressive" in the way that the enumerated crimes share those characteristics. *Begay* v. *United States*, 553 U.S. 137, 142-148 (2008). Vehicular flight from police satisfies both parts of that test.

A. Vehicular Flight From Law Enforcement Presents A Serious Potential Risk Of Physical Injury To Others That Is Comparable To The Risk Posed By The Enumerated Crimes

In *James*, this Court held that an offense presents a "serious" potential risk of physical injury to another if the risk of injury that it creates is comparable in degree to the risk posed by one of the enumerated offenses. See 550 U.S. at 203, 208 (stating that the enumerated offenses provide "a baseline against which to measure the degree of risk that a nonenumerated offense must 'otherwise' present in order to qualify"). In determining whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, the Court follows a "categorical approach." *Id.* at 202 (quoting *Shepard* v. *United States*, 544 U.S. 13, 17 (2005)). The Court considers the crime generically, measured by the legal definition of the offense rather than how it was committed on a particular occasion. *Ibid.* The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 208. Instead, the Court examines "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

The Court in *James* concluded that the potential risk of physical injury presented by attempted burglary is comparable in degree to the risk posed by the enumerated offense of burglary. It noted that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Attempted burglary, the

Court held, creates a similar "risk of violent confrontation." *Id.* at 203-204. Considering both the likelihood of confrontation and the likelihood that any confrontation will result in injury, the Court concluded that the risk posed by attempted burglary is similar in degree to the risk posed by burglary. *Id.* at 211.

Vehicular flight from law enforcement presents a serious potential risk of physical injury to others that is comparable in degree to the risk posed by burglary and the other enumerated crimes. Like burglary, vehicular flight creates a serious potential risk of a violent confrontation, except that the risk is even greater because the flight necessarily occurs in the presence of a law enforcement officer who is likely to be armed and to take immediate steps to pursue and detain the offender. Case law, media reports, and statistical data all confirm that, faced with the prospect of pursuit, an offender who flees typically will not hesitate to endanger others to make good on his escape. Moreover, when an offender's flight gives rise to pursuit by law enforcement, the ensuing chase only heightens the risk of physical injury to others. Vehicular flight thus places the lives and safety of law enforcement officers, other motorists, and pedestrians in serious danger.

1. An offender's flight in a vehicle creates a serious potential risk of a confrontation with law enforcement officers attempting to capture him

Under Indiana law, it is a crime to "knowingly or intentionally * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop," Ind. Code § 35-44-3-3(a)(3), and that crime is elevated to a felony if "the person uses a vehicle to commit the offense," *id.* § 35-44-3-3(b)(1)(A). That type of vehicular

flight creates a serious risk of a confrontation between the offender and others, because the offender's flight from law enforcement officers is likely to trigger an immediate effort by those officers to pursue and capture him. See, *e.g.*, *United States* v. *Harrimon*, 568 F.3d 531, 535 (5th Cir.) ("Fleeing by vehicle requires disregarding an officer's lawful order, which is a clear challenge to the officer's authority and typically initiates pursuit."), cert. denied, 130 S. Ct. 1015 (2009).

Indeed, that risk of confrontation is significantly greater than the risk of confrontation between a burglar and either the police or the occupants of the premises being burglarized. A burglar generally goes out of his way to ensure that his offense goes undetected. See, *e.g.*, *United States* v. *Constantine*, 263 F.3d 1122, 1126 (10th Cir. 2001) ("Avoiding detection also facilitates commission of a burglary."). By contrast, vehicular flight cannot possibly go undetected under Indiana law: the offender must flee "from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop." Ind. Code § 35-44-3-3(a)(3). Such flight thus "will always involve an overt * * * disobedience of an officer's command and will occur directly in the officer's presence." *United States* v. *West*, 550 F.3d 952, 964 n.9 (10th Cir. 2008); *id.* at 965 ("[A] driver's refusal to stop a vehicle when commanded to do so will always be directly confrontational.").

Because vehicular flight involves disobedience that occurs directly in the presence of a law enforcement officer, that officer generally will take immediate steps to pursue and detain the offender. A recent study of state, county, and municipal police agencies found that virtually all of them permit officers to pursue fleeing vehicles

in certain circumstances. See Cynthia Lum & George Fachner, *Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database* 37 (2008) (*Police Pursuits*) (finding that 73 of 77 police agencies, or 94.8%, permit pursuit); see also Kenneth L. Bayless & Robert Osborne, *A Report by the Pursuit Management Task Force* 8 (1998) ("Virtually every police agency allows for pursuit under some circumstances. Of the responding agencies, 99% allow their officers to engage in pursuits."). Although many agencies' policies limit the circumstances in which pursuit is permitted, 98.6% of policies do not require authorization by a supervisor before initiating pursuit; 95.9% do not limit the speed of the pursuing officer; and 74% permit pursuit even when no felony is involved. See *Police Pursuits* 37-38.

Law enforcement officials have good reasons for their efforts to capture offenders who flee in their vehicles. Although many pursuits are initiated for relatively minor infractions, many of those apprehended are charged with serious felony offenses that are unrelated to the pursuit. For instance, a study of more than 5,000 police pursuits in California found that 52% of those pursuits began with an attempted stop for a minor violation, but 73% of those apprehended were charged with felony violations and approximately 66% of felony arrests were for charges other than evading law enforcement officers. Maurice J. Hannigan & Kerri A. Hawkins, *Evaluation of Risk: Initial Cause vs. Final Outcome in Police Pursuits* 1 (1995); see Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. Crim. L. & Criminology 521, 535 (1989) (finding that "nearly 50%" of those apprehended "were charged with serious felony offenses unrelated to the

pursuit"). Simply put, "many offenders flee from the officer because of concern over more than the traffic offense that initiated the pursuit." *Ibid.*

2. A confrontation between a fleeing offender and law enforcement officers attempting to capture him has a serious potential to become violent

When an offender flees in a vehicle and dares officers to give chase, there is a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians. That is because "the use of a vehicle, usually a car, to evade arrest or detention typically involves violent force which the arresting officer must in some way overcome." *Harrimon*, 568 F.3d at 535. "[N]ot only the arresting officer or officers, but also pedestrians and other motorists are subject to this [violent] force." *Ibid.* Although it is possible to drive a vehicle at low speeds or in a manner that does not endanger officers or bystanders, an offender typically "will not hesitate to endanger others to make good his or her escape." *Id.* at 536. This case illustrates that point: petitioner's prior conviction for vehicular flight involved driving on the wrong side of the road, as well as driving through residential yards in which people were standing, before striking the rear of a house. See p. 3 note 1, *supra*.

Indeed, cases from this Court and other courts are replete with descriptions of the violence and mayhem that can erupt when an offender flees from police in a vehicle. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 374-375, 380 (2007) (describing "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury"); *County of Sacramento* v. *Lewis*, 523 U.S. 833, 837 (1998) (describing how a passenger aboard a motorcycle was fatally injured during a high-speed chase with

police); *Ellis* v. *Ogden City*, 589 F.3d 1099, 1100-1101 (10th Cir. 2009) (suspect fleeing from police collided with and killed another motorist); *Jones* v. *Byrnes*, 585 F.3d 971, 973-974 (6th Cir. 2009) (per curiam) (same); *United States* v. *Bear Robe*, 521 F.3d 909, 910 (8th Cir. 2008) (suspect fled from police, during which a passenger was ejected from the vehicle and killed); *Sanders* v. *City of Union Springs*, 207 Fed. Appx. 960, 962 (11th Cir. 2006) (per curiam) (suspect fleeing from police caused a collision, killing the suspect and his two-year-old passenger and severely injuring other motorists).

Newspaper reports confirm that vehicular flight places the lives and safety of law enforcement officers, motorists, and pedestrians in serious danger. See, *e.g.*, Freeman Klopott, *Crash During Police Chase Kills Father of Four*, Washington Examiner, Nov. 22, 2010, at 4 ("A father of four taking his son and daughter out for a late lunch in Silver Spring was killed when a driver fleeing police crossed a double-yellow line, slammed into a sport utility vehicle * * * and sent it into a utility pole."); Justin Fenton, *Woman Killed During Pursuit Identified*, Baltimore Sun, July 27, 2010, at 4A (reporting that a suspect fled police "at a high rate of speed," "struck two officers' vehicles," and "crashed into a woman's vehicle" and killed her); Lisa Rein & James Hohmann, *Crashes, Injuries Left in Wake of Pr. George's-Baltimore Chase*, Washington Post, Nov. 22, 2009, at C3 (reporting that a suspect "led police Saturday on a high-speed chase through Prince George's County and into Baltimore, injuring two Maryland state troopers and a motorist"); Brigid Schulte, *Car-Theft Suspect Hits 4 Vehicles, Including Cruisers*, Washington Post, Sept. 24, 2007, at B4 (reporting that a suspect

"led three police cruisers on a roundabout chase * * * and rammed four vehicles, sending one passenger to the hospital").

Case law and media reports thus strongly support the common sense notion that vehicular flight typically presents a serious potential risk of physical injury to others. An offender who has ignored a law enforcement officer's command to stop and is actively fleeing from police in a motor vehicle will often feel threatened by those who confront him and therefore will resort to violence. See, *e.g.*, *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) ("[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so."). If anything, an offender's deliberate disobedience only underscores that the offender is not willing to peaceably submit to officers' efforts at capture. Likewise, that active defiance places law enforcement officers on notice that the offender has a demonstrated hostility to custody and that they must be prepared to protect themselves in the event of a confrontation. In numerous respects, an offender's flight in a vehicle creates a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians.

3. Statistical data confirms the existence of a serious potential risk of physical injury to others

a. Petitioner does not actually argue that vehicular flight fails to create a serious potential risk of physical injury to others. Rather, petitioner argues that the government failed to "present the district court or the court of appeals with any empirical data regarding the risk of injury" created by vehicular flight. Br. 17. Petitioner cites no evidence that Congress intended the decision

whether an offense presents a serious risk to depend on statistical analysis rather than judicial judgment based on experience and common sense. Indeed, petitioner's empirical evidence requirement would mean that many dangerous crimes might fail to qualify as violent felonies under the ACCA's residual clause, because statistical evidence on the riskiness of a particular offense often will not be available. It is difficult to imagine that Congress intended that result when it included the ACCA's "broad residual provision." *James*, 550 U.S. at 200.

To the extent that this Court has examined whether statistical evidence is required, it has rejected the notion. In *James*, this Court held that attempted burglary presents the necessary risk despite the absence of "hard statistics." 550 U.S. at 210. As the Court recognized, the "ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses." *Id.* at 210 n.6; see *id.* at 210 (recognizing the difficulty of comparing the risks posed by dissimilar offenses in the absence of statistical data). Even the dissent in *James*, which disagreed with the Court's evaluation of the risk presented by attempted burglary, acknowledged that courts may have to decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 227 (Scalia, J., dissenting) (internal quotation marks and citation omitted). It simply is not true, as petitioner appears to assume, that the government must introduce statistical data whenever a defendant disputes whether a prior conviction falls within the ACCA's residual clause.

Petitioner is correct that, in *Chambers* v. *United States*, 129 S. Ct. 687 (2009), this Court looked to a report prepared by the United States Sentencing Commission and concluded that "the study strongly supports the

intuitive belief that failure to report does not involve a serious potential risk of physical injury." *Id.* at 692. But there is a vast difference between saying that statistical data, when it is available, can be helpful in determining the risk posed by a particular offense, and saying that such data is invariably necessary to establish the riskiness of a given offense. See *United States* v. *Harrison*, 558 F.3d 1280, 1295 n.26 (11th Cir. 2009) ("[W]e caution that *Chambers* does not say empirical evidence is always required."). This Court may rely, as the court of appeals did, on its own experience and judicial judgment in holding that vehicular flight creates a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians.

b. In any event, statistical data strongly supports the common sense proposition that vehicular flight creates a serious potential risk of physical injury to others.[3] According to data collected by the National Highway Traffic Safety Administration (NHTSA), from 2000 to 2009, a total of 3,625—or an average of 363 people each year—were killed in crashes involving the pursuit of fleeing suspects. National Ctr. for Statistics & Analysis, *Fatalities in Motor Vehicle Crashes Involving Police in Pursuit* 37-56 (2010). Of those fatalities, approximately

[3] Petitioner is correct that the government did not introduce any statistical data before the lower courts, but petitioner never claimed before those courts that he could not be sentenced as an armed career criminal absent such data. In the court of appeals, petitioner filed his opening brief more than two months after this Court's decision in *Chambers*. See I J.A. 3. Yet petitioner did not claim in that brief (or in any of his subsequent filings) that the court of appeals could not find the requisite degree of risk in the absence of empirical data. Petitioner advances that claim for the first time before this Court, see Br. 16-18, and the government accordingly responds to that claim here for the first time.

65% were occupants of the pursued vehicle (2,356 total, or 236 per year); 33% were occupants of another vehicle or pedestrians (1,214 total, or 121 per year); and 2% were police (55 total, or 6 per year). *Ibid.*

Other studies based on NHTSA data have found similar results over different periods of time. See H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, 11 Prehospital Emergency Care 278, 280 (2007) (finding that, between 1982 and 2004, the average number of annual fatalities was 323, more than one-fourth of whom were other motorists, pedestrians, or police) (*A Review of Police Pursuit Fatalities*); Fred P. Rivara & C.D. Mack, *Motor Vehicle Crash Deaths Related to Police Pursuits in the United States*, 10 Injury Prevention 93, 94 (2004) (finding that, between 1994 and 2002, "approximately 300 lives [were] lost each year in the United States from police pursuit related crashes and one third of these [were] among innocent people, not being pursued by the police").

Those statistics, although revealing, understate the relevant number of fatalities in at least two respects. First, although the majority of fatalities are occupants of the pursued vehicle, many of those individuals are not culpable in the flight. Indeed, children and adolescents account for nearly half of all passenger deaths from vehicular flight. See *A Review of Police Pursuit Fatalities* 281 (finding that, between 1982 and 2004, "children and adolescents accounted for 48% of all passenger deaths in the chased vehicle").[4] Harms to nonculpable passengers should be considered in assessing whether a culpable driver's flight "presents a serious potential risk

[4] There is no indication what percentage of adolescent passengers are culpable in the vehicular flight that results in their deaths. See *A Review of Police Pursuit Fatalities* 281.

of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Second, NHTSA depends on voluntary reporting from police departments to compile its data, but "many law enforcement officers are not trained to check the 'pursuit-related' box when a fatality occurs." Geoffrey P. Alpert et al., *Policing: Continuity and Change* 194 (2006). Some experts estimate that the death toll "could double if the [fatality] forms were completed correctly." *Ibid.*

In addition to underreporting the number of fatalities caused by vehicular flight, NHTSA's data does not reflect nonfatal injuries caused by vehicular flight. For example, a recent study funded by the Department of Justice examined 7,737 vehicular pursuits conducted by 56 law enforcement agencies in 30 states over a seven-year period. See *Police Pursuits* 54. That study found that 1,817 pursuits (23.5%) resulted in accidents and 694 (9%) resulted in some form of injury. *Id.* at 57. Of the 900 total injuries reported in the study, 313 injuries were suffered by innocent bystanders or police officers. *Ibid.* And of those 313 injuries, only seven (2%) were fatal. *Ibid.* Those figures indicate that while far more than a hundred innocent individuals or law enforcement officers are killed each year as a result of police pursuits, thousands more are physically injured. See L. Edward Wells & David N. Falcone, *Research on Police Pursuits: Advantages of Multiple Data Collection Strategies*, 20 Policing Int'l J. Police Strategy & Mgmt. 729, 739 (1997) (finding that most studies indicate that 23% to 41% of pursuits end in accidents and 9% to 17% result in injuries).

Of course, not every incident of vehicular flight results in pursuit by police. It is therefore possible that data focused specifically on incidents of vehicular flight

that trigger police pursuit may overstate to some degree the risk of injury from vehicular flight. But the degree of overstatement is likely to be slight for two reasons. First, as explained above, most police departments permit their officers to pursue fleeing suspects in a wide range of situations. See p. 20, *supra*. Second, the fact that officers sometimes choose not to pursue fleeing offenders does not eliminate the risk that those offenders pose to the public. As this Court recognized in *Scott*, when police "deactivate their flashing lights and turn around," a fleeing suspect cannot be sure whether "the chase [is] off" or whether instead officers are "simply devising a new strategy for capture." 550 U.S. at 385. Faced with that uncertainty, the suspect may be "just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." *Ibid.*

Indeed, it is not at all unusual for fleeing offenders to crash their vehicles after the police abandon pursuit or even when the police never give chase at all. See, *e.g.*, Peter Hermann, *Attempt to Elude Police Ends in Fiery Four-Car Crash*, Baltimore Sun, Oct. 12, 2010, at 3A (reporting that a fleeing suspect "crashed into three parked cars, causing all four vehicles to burst into flames," even though the police did not give chase and simply "caught up to the vehicle by following the path of destruction"); Phillip Rucker, *Girl, 2, Dies After Man Hits Car, Runs*, Washington Post, Oct. 22, 2007, at B1 (reporting that three adults were critically injured and a toddler was killed when an unpursued suspect crashed into their car at a Northwest Washington intersection); Ernesto Londono & Debbi Wilgoren, *Md. Crash Came After High-Speed D.C. Chase*, Washington Post, Dec. 5, 2006, at B6 (reporting that a suspect fleeing from District of Columbia police killed two individuals in Silver

Spring, Maryland, even though police "turned around" when they reached the Maryland border). Whether or not authorities give chase, vehicular flight poses a major threat to the safety of innocent passengers, other motorists, pedestrians, and police officers.

c. Available data further suggests that the risk of physical injury to others posed by vehicular flight is comparable to the risk posed by the ACCA's enumerated crimes. In the broad-based study of vehicular pursuits discussed above, there were 313 injuries (including fatal injuries) to bystanders and police from 7,737 reported pursuits, or "roughly .04 injuries to others per pursuit." *Harrimon*, 568 F.3d at 537. By comparison to the enumerated crime of arson, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." *Ibid.* (citing U.S. Fire Admin., *Arson in the United States*, 1 Topical Fire Research Series (Jan. 2001), http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf). In fact, that rate of arson injury may be too high, because it may include injuries to perpetrators who set arson fires. *Ibid.* In any event, the risk of injury to others from vehicular flight (which is .04 injuries per pursuit) is at least "roughly similar"—indeed, it is significantly greater than—the risk associated with arson (which is less than .01 injuries per arson). *Begay*, 553 U.S. at 143.

That rough similarity likely remains true with respect to two other enumerated crimes: burglary and offenses involving the use of explosives. The Bureau of Justice Statistics estimates that there were approximately 3.7 million household burglaries per year from 2003 to 2007. Shannon Catalano, *Victimization During Household Burglary* 1 (Sept. 2010), http://bjs.ojp.usdoj.

gov/content/pub/pdf/vdhb.pdf. Of those total burglaries, approximately 266,650 burglaries involved violence in some form, but only about 118,000 burglaries resulted in physical injury to a member of the household. *Id.* at 9-10. Those figures amount to .032 injuries per household burglary. As for offenses involving the use of explosives, statistics compiled by the United States Bomb Data Center show that, on average from 2004 to 2008, there were approximately 523 intentional bombings and 29 resulting injuries each year. Office of Strategic Intelligence & Info., Bureau of Alcohol, Tobacco, Firearms & Explosives, *Explosive Incident Data: Years: 2004, 2005, 2007, 2008* 3-7 (2010). As with arson, that rate of injury (.055 injuries per intentional bombing) may be too high, because it may include injuries to perpetrators. But at the least, the rate of physical injury to others from intentional bombing—which is surely one of the more dangerous crimes involving the use of explosives—is roughly similar to the rate of injury from vehicular flight.[5]

[5] In this case, it does not matter whether the risk of physical injury to others is measured by comparing the number of annual injuries to the number of annual incidents of vehicular flight, see *Begay*, 553 U.S. at 154 (Scalia, J., concurring), or by examining the total annual number of actual and potential victims of vehicular flight, *id.* at 162-163 (Alito, J., dissenting). Likewise, it does not matter if the severity of a given level of risk is judged in relation to the risk posed by the most analogous enumerated crime, see *James*, 550 U.S. at 203, or in relation to the risk posed by the least dangerous enumerated crime, see *id.* at 219 (Scalia, J., dissenting). Using any methodology or substantive standard, vehicular flight poses a serious potential risk of physical injury to others within the meaning of the ACCA's residual clause.

B. Vehicular Flight From Law Enforcement Is Purposeful, Violent, And Aggressive In The Same Way As The Enumerated Crimes

In both *Begay* and *Chambers*, this Court addressed what characteristics serve to qualify an offense as a "violent felony" under the ACCA's residual clause. In *Begay*, the Court concluded that the presence of the four enumerated offenses, coupled with the use of the word "otherwise," indicates that the residual clause extends only to "crimes that are roughly similar, in kind as well as in degree of risk posed," to the listed offenses. 553 U.S. at 143-144. To qualify as similar in kind, a crime must, like the enumerated offenses, involve "purposeful, violent, and aggressive" conduct. *Id.* at 145. That similarity among the listed offenses is "pertinent," the Court reasoned, because it relates to the ACCA's "basic purpose[]": identifying prior crimes the commission of which makes it more likely that the offender, later possessing a gun, would use the gun to harm others. *Id.* at 144, 146.

The Court held in *Begay* that the New Mexico offense of repeatedly driving under the influence of alcohol does not satisfy that test because, even assuming that the offense presents a serious potential risk of physical injury to others, it is a "strict liability" offense that "typically" does not involve "purposeful, violent, and aggressive conduct." 553 U.S. at 141, 145. The Court observed that "statutes that forbid driving under the influence" generally criminalize "conduct in respect to which the offender need not have had any criminal intent at all." *Id.* at 145. For that reason, the Court concluded that, unlike the enumerated offenses of burglary and arson, which involve "intentional or purposeful conduct," a conviction for driving under the influence

does not show an increased likelihood that the offender is the kind of person who might deliberately harm others. *Id.* at 146.

The next Term, in *Chambers*, this Court held that failure to report for penal confinement is not a violent felony under the ACCA. 129 S. Ct. at 693. Because the Illinois statute at issue criminalized "several different kinds of behavior," the Court distinguished the types of behavior involving failure to report from "the less passive, more aggressive behavior underlying an escape from custody." *Id.* at 691. The Court then reasoned that failure to report "amounts to a form of inaction," which is unlike the more active offenses listed in Section 924(e)(2)(B)(ii). *Id.* at 692. The Court noted that among recent federal cases involving a defendant's failure to report, none had involved violence during the commission of the offense itself or during the defendant's later apprehension by authorities. *Ibid.* The Court therefore concluded that a defendant who fails to report is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" *Ibid.* (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

The decision below is fully consistent with *Begay* and *Chambers*. Vehicular flight from police presents risks different in kind from those presented by the offenses at issue in those cases. Unlike the New Mexico offense of driving under the influence at issue in *Begay*, the Indiana offense of vehicular flight at issue in this case requires knowing or intentional conduct. And unlike the Illinois offense of failure to report for penal confinement at issue in *Chambers*, vehicular flight is not a passive crime, because it involves deliberate action to evade the police. Rather, like the analogous offense of escape from

custody, vehicular flight from police is characterized by active behavior akin to the conduct underlying the ACCA's enumerated crimes. In addition, evasion of police is both aggressive and violent, because it typically involves conduct that endangers the lives and safety of passengers, other motorists, pedestrians, and police officers. Moreover, vehicular flight creates the risk of pursuit by and confrontation with officers—and that pursuit and confrontation are fraught with danger for not only the officers but also other individuals.

1. Vehicular flight involves purposeful conduct

The court of appeals correctly held that the Indiana offense of vehicular flight from law enforcement officers involves purposeful conduct. See I J.A. 31. The Indiana statute at issue criminalizes various ways of resisting law enforcement, and it requires in relevant part that the offender "*knowingly or intentionally* * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop." Ind. Code § 35-44-3-3(a)(3) (emphasis added).[6] The Indiana offense of vehicular flight thus involves purposeful conduct because it requires a mental state of knowledge or intent. Cf. *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) ("[T]here is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.") (citation omitted). Indeed, petitioner himself concedes that the Indiana offense of vehicular flight "may be con-

[6] Intent and knowledge are the two highest mental states under Indiana criminal law. See Ind. Code § 35-41-2-2(a) (2004) ("A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."); *id.* § 35-41-2-2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of the high probability that he is doing so.").

sidered 'purposeful' to the extent that it requires proof of knowledge or intent." Br. 11.[7]

The Indiana statute's requirement that flight be knowing or intentional readily distinguishes this case from *Begay*. Unlike the failure-to-report offense in *Begay*, the Indiana offense is not a "strict-liability crime" aimed at conduct "in respect to which the offender need not have had any criminal intent at all." 553 U.S. at 145-146; see I J.A. 31 ("Indiana's resisting statute criminalizes flight that is done 'knowingly [or]

[7] Petitioner suggests in a footnote that for an offense to be "purposeful" in a way that satisfies the ACCA's residual clause, the offense must intrinsically involve "trying to harm a person's person or property." Br. 11 n.2 (quoting *Welch* v. *United States*, 604 F.3d 408, 434 (7th Cir. 2010) (Posner, J., dissenting), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010)). That suggestion, which petitioner makes for the first time in this Court, is at odds with the statutory text and this Court's decision in *Begay*. The ACCA's residual clause extends to any offense that "involves conduct that presents a *serious potential risk* of physical injury to another," regardless of whether the offense has as an element that the perpetrator intended to injure people or property. For instance, the enumerated crime of burglary does not require proof of intent to harm people or property. Rather, in its generic modern form, burglary requires only proof of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). Moreover, under petitioner's test, a number of dangerous crimes would not qualify as ACCA violent felonies, including escape from custody pursuant to 18 U.S.C. 751(a), see *Chambers*, 129 S. Ct. at 691; carrying a firearm during and in relation to a drug trafficking offense pursuant to 18 U.S.C. 924(c), see *United States* v. *Stephens*, 237 F.3d 1031, 1033 (9th Cir.), cert. denied, 534 U.S. 956 (2001); and even placing a dangerous chemical device aboard an aircraft pursuant to 18 U.S.C. 31(a)(3), 32(a)(2). Finally, this Court in *Begay* did not require that an offense involve intentional conduct specifically targeted at harming persons or property. See 553 U.S. at 145-146 (contrasting "crimes involving intentional or purposeful conduct" with "crime[s] of negligence or recklessness") (citation omitted).

intentionally,' which satisfies the requirement that the conduct be purposeful, in contrast to DUI, which is more like a strict liability offense."); *United States* v. *Spells*, 537 F.3d 743, 752 (7th Cir. 2008) ("The Indiana law specifically provides that the flight must be done 'knowingly or intentionally,' thus ensuring that the law is only violated when an individual makes a 'purposeful' decision to flee from an officer."), cert. denied, 129 S. Ct. 2379 (2009); *Harrimon*, 568 F.3d at 534 ("[U]nlike the DUI statute at issue in *Begay*, fleeing by vehicle requires intentional conduct.").

2. Vehicular flight involves aggressive and violent conduct

a. The court of appeals also correctly held that vehicular flight from law enforcement officers involves aggressive conduct. See 1 J.A. 33. In *Chambers*, this Court considered a single Massachusetts statutory provision that criminalized "several different kinds of behavior," including various ways in which offenders could fail to report to penal authorities or escape from the custody of those authorities. 129 S. Ct. at 691. Although the lower courts in *Chambers* had treated those behaviors as different ways of committing a single offense, the Court disagreed, holding that "a failure to report * * * is a separate crime, different from escape." *Ibid.* In the Court's view, those offenses merited distinct treatment in part because "[t]he behavior that underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Ibid.*

Looking only at the offense of failure to report, the Court held that it is not a violent felony under the ACCA. See *Chambers*, 129 S. Ct. at 693. The Court reasoned that failure to report "amounts to a form of inac-

tion, a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender" commits any of the ACCA's enumerated crimes. *Id.* at 692 (some internal quotation marks omitted). Failure to report is essentially a passive and nonviolent crime, the Court explained, because although "an offender who fails to report must of course be doing something at the relevant time, there is no reason to believe that the something poses a serious risk of physical injury." *Ibid.* (emphasis omitted). If anything, the Court observed, "an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Ibid.*

As the court of appeals recognized, vehicular flight is aggressive conduct within the meaning of *Begay* and *Chambers*. The court reasoned that the Indiana statute's "knowing [or] intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by choosing to continue driving rather than pull over." I J.A. 33; see *Welch* v. *United States*, 604 F.3d 408, 424 (7th Cir. 2010) ("While failure to report is a passive crime characterized by inaction, vehicular fleeing necessarily involves affirmative action on the part of the perpetrator.") (internal citation omitted), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010). For that reason, "[a] felony conviction for resisting law enforcement in Indiana is a crime of action more like escape than 'failure to report,' a crime of inaction." I J.A. 33; see *United States* v. *LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009) ("What is fleeing and eluding but an attempt to escape? It is certainly not a form of inaction."), cert. denied, 130 S. Ct. 1311 (2010).

Petitioner does not argue that "[t]he behavior that likely underlies" vehicular flight is any "less likely to involve risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Chambers*, 129 S. Ct. at 691; see *Harrimon*, 568 F.3d at 535 ("[A]ctive defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody."); *United States* v. *Howze*, 343 F.3d 919, 922 (7th Cir. 2003) ("Indeed, flight may be even more dangerous than escape, because many escapes do not entail flight to avoid capture—but *all* flights involve that risk-creating conduct."). Whether an offender is fleeing from attempted apprehension or escaping from actual custody, his behavior is an active, aggressive attempt to avoid capture and detention by law enforcement authorities.[8]

b. The court of appeals likewise correctly held that vehicular flight from law enforcement officers involves violent conduct. See I J.A. 31-32. As an initial matter, vehicular flight involves a "deliberate choice by the driver to disobey the police officer's signal." *James*, 337 F.3d at 391. That disobedience "is a clear challenge to the officer's authority," *Harrimon*, 568 F.3d at 535, and it therefore "poses the threat of a direct confrontation between the police officer and the occupants of the vehicle," *James*, 337 F.3d at 391. See *Harrimon*, 568 F.3d at 535 ("[F]leeing by vehicle 'will typically lead

[8] Several courts of appeals to consider the question since *Chambers* have concluded that escape from custody is either a violent felony under the ACCA or a crime of violence under the Sentencing Guidelines. See *United States* v. *Hughes*, 602 F.3d 669, 677 (5th Cir. 2010), petition for cert. pending, No. 10-5289 (filed July 6, 2010); *United States* v. *Willings*, 588 F.3d 56, 60 (1st Cir. 2009); *United States* v. *Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009); but see *United States* v. *Hart*, 578 F.3d 674, 681 (7th Cir. 2009).

to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence.") (quoting *West*, 550 F.3d at 970). Because vehicular flight "calls the officer to give chase," such flight "dares the officer to needlessly endanger himself in pursuit." *Spells*, 537 F.3d at 752.

In *James*, this Court held that attempted burglary is a violent felony under the ACCA primarily because of "the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Intentional vehicular flight escalates that possibility of confrontation into a certainty: under Indiana law, the offender must flee following an officer's order to stop. See Ind. Code § 35-44-3-3(a)(3). In addition, this Court in *Chambers* held that an offender who fails to report for confinement is not "significantly more likely than others to attack, or physically to resist, an apprehender." 129 S. Ct. at 692. But an offender who flees from police has already demonstrated his willingness "physically to resist" apprehension. Vehicular flight thus inherently involves direct confrontation with police. See *West*, 550 F.3d at 965 ("While there may be escapes that do not involve a direct confrontation, a driver's refusal to stop a vehicle when commanded to do so will always be directly confrontational.").

That confrontation between offender and officer carries the potential for violence, because "the use of a vehicle, usually a car, to evade arrest or detention typically involves violent force which the arresting officer must in some way overcome." *Harrimon*, 568 F.3d at 535. The very purpose of flight "is to avoid detention or arrest by a police officer." *United States* v. *Young*, 580 F.3d 373,

378 (6th Cir. 2009), cert. denied, 130 S. Ct. 1723 (2010). As a result, "offenders typically attempt to flee by any means necessary, including speeding, extinguishing lights at nighttime, driving the wrong way, weaving," and other similar means. *Ibid.*; see *West*, 550 F.3d at 964 ("[U]nder the stress and urgency which will naturally attend his situation, a person fleeing from law enforcement will likely drive recklessly and turn any pursuit into a high-speed chase with potential for serious harm to police or innocent bystanders.") (citation omitted).

Those actions frequently present a substantial danger to innocent passengers, other motorists, pedestrians, and police officers. See, *e.g.*, *Harrimon*, 568 F.3d at 535 ("[N]ot only the arresting officer or officers, but also pedestrians and other motorists are subject to this [violent] force."); *West*, 550 F.3d at 964 n.9 ("[Vehicular flight] will likely occur in the presence of innocent and unsuspecting bystanders."); *Howze*, 343 F.3d at 922 ("Bystanders are in particular jeopardy. Collisions between fleeing vehicles and pedestrians or others who get in the way are common."). In the usual case, fleeing from a police officer in a motor vehicle involves the type of violent conduct that "creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." *Harrimon*, 568 F.3d at 536 (quoting *West*, 550 F.3d at 964-965); see *United States* v. *Rogers*, 594 F.3d 517, 521 (6th Cir. 2010) ("As a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create [an] actual risk of death or injury."), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010).

Classifying vehicular flight as a violent felony under the ACCA accords with Congress's desire to punish more harshly a particular subset of career criminals, *i.e.*, those career criminals who not only possess firearms but are likely to use them. See *Begay*, 553 U.S. at 146. Consistent with that purpose, an offender's "willingness to use a vehicle to flout an officer's lawful order to stop" demonstrates an increased risk that "the offender would, if armed and faced with capture, 'deliberately point the gun and pull the trigger.'" *Harrimon*, 568 F.3d at 535 (quoting *Begay*, 553 U.S. at 146). As the Seventh Circuit has explained, "[a]n individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest." *Welch*, 604 F.3d at 425 (second set of brackets in original) (quoting *Spells*, 537 F.3d at 752).

Statistical data confirms that common sense point. According to statistics published by the Department of Justice, approximately one out of every four state and federal inmates convicted for brandishing or displaying a firearm used the gun in that manner in an effort to "get away." See Caroline Wolf Harlow, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 11 (Nov. 2001), http://www.ojp.usdoj.gov/content/pub/pdf/fuo.pdf; *Spells*, 537 F.3d at 752. In the same way that a firearm can facilitate escape, so too can a motor vehicle: "[a]s a person is in flight from custody, his vehicle has the potential to become a deadly or dangerous weapon." *United States* v. *Kendrick*, 423 F.3d 803, 809 (8th Cir. 2005). An offender's willingness to use his motor vehicle

to escape arrest or detention thus demonstrates an increased likelihood that, if the offender were in possession of a firearm, he would use that firearm in an effort to evade arrest. For those reasons, vehicular flight involves the type of violent and aggressive conduct that merits a higher mandatory minimum sentence under the ACCA.

C. Petitioner's Arguments That Vehicular Flight Is Not A Violent Felony Under The ACCA Lack Merit

Petitioner contends that vehicular flight is not a violent felony under the ACCA for four reasons. First, petitioner argues that the Indiana offense of vehicular flight does not have as an element the use of violence, and thus the court of appeals' focus on "the possible future consequences of the offense improperly expanded upon the elements of the offense." Br. 12. Second, petitioner argues that, by considering the injuries that occur as an offender flees, the court of appeals "also improperly expanded the time frame of the offense." Br. 13. Third, petitioner argues (Br. 15) that vehicular flight cannot be a violent felony, because the Indiana statute separately criminalizes flight that actually creates a substantial risk of bodily injury to others. Fourth, petitioner argues that "the rule of lenity requires that the statute be interpreted in his favor." Br. 18 n.6. None of those arguments is persuasive.

1. Determining whether an offense presents a serious potential risk of physical injury to others does not require impermissible factfinding

The court of appeals held that vehicular flight involves purposeful, aggressive, and violent conduct within the meaning of *Begay*, in part because "[t]he offender's purposeful decision to do something that is inherently

likely to lead to violent confrontation is an aggressive, violent act." I J.A. 31. According to the court, "this combination of mental state and likelihood of confrontation with authorities is aggressive and violent because it is an invitation to, or acceptance of[,] the potential violent outcome by the offender." *Ibid.* The court of appeals recognized "that a predicate offense may not *require* that an offender actually endanger others through his flight." *Id.* at 31-32. The court explained that the ACCA's enumerated crimes "also do not *require* that the offender put others in danger." *Id.* at 32. What vehicular flight and the enumerated crimes share, the court reasoned, is that all of those offenses are purposeful, aggressive, and violent. *Ibid.*

Petitioner observes (Br. 12) that the Indiana offense of vehicular flight does not have as an element the use of violence. From that fact, petitioner argues that the court of appeals erred in assessing the risk posed by "the typical commission of the offense" of vehicular flight, because that method "allow[s] a federal sentencing court to find conduct relating to the state offense that is outside the definition of the offense." *Ibid.* (internal quotation marks and citation omitted). According to petitioner, this Court in *James* made clear that, in assessing whether an offense qualifies under the ACCA's residual clause, sentencing courts may "consider only the conduct encompassed by the elements of the offense." *Ibid.* That rule is necessary, petitioner asserts, to safeguard defendants' Sixth Amendment rights. Br. 12-13.

Petitioner misunderstands the inquiry required by the ACCA's text and this Court's decision in *James*. Section 924(e)(2)(B)(ii) of the ACCA defines a "violent felony" as "any crime" that "is burglary, arson, or extor-

tion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The ACCA's residual clause thus focuses on the "conduct" involved in the commission of an offense and whether that conduct presents a "serious potential risk" of injury to others. For that reason, this Court in *James* held that to determine whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, sentencing courts must follow a "categorical approach." 550 U.S. at 202. The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 208. Rather, the focus is on the risk created by "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

Employing that approach, the court of appeals correctly considered whether the Indiana offense of vehicular flight, in the ordinary case, creates a serious potential risk of physical injury to innocent passengers, other motorists, pedestrians, and police. See I J.A. 30-33. Petitioner disagrees with the court's conclusion that the typical incident of vehicular flight is quite risky, but that disagreement provides no basis for questioning the court's methodology. The court was explicit that it was not considering the particular facts underlying petitioner's conviction. *Id.* at 37. Rather, the court made clear that it was following "[this] Court's categorical approach for ascertaining whether an offense is a violent felony under the ACCA." *Id.* at 30; see *id.* at 31-32 (noting that the elements of the Indiana offense do not require "that an offender actually endanger others through his flight").

Petitioner contends (Br. 12) that in finding a serious potential risk to others from vehicular flight, the court

of appeals engaged in improper factfinding. But in *James* itself, this Court concluded that attempted burglary is an ACCA violent felony primarily because of "the *possibility* of a face-to-face confrontation between the burglar and a third party * * * who comes to investigate." 550 U.S. at 203 (emphasis added). Of course, that possibility of confrontation is not itself an element of attempted burglary. A would-be burglar is guilty even if there is no one at home or otherwise in the vicinity. *Id.* at 207. The relevant inquiry under *James* is whether, in a typical case, the conduct involved in the commission of an offense presents a serious risk of harm to others. The court of appeals correctly concluded that vehicular flight presents such a risk for several reasons, including that flight, like burglary or attempted burglary, creates a serious risk of a violent confrontation.

Petitioner further contends (Br. 12-13) that the court of appeals made factual findings in a manner that implicates Sixth Amendment concerns. Again, that contention is foreclosed by *James*, in which this Court rejected precisely that argument: "In determining whether attempted burglary under Florida law qualifies as a violent felony under [the ACCA's residual clause], the Court is engaging in statutory interpretation, not judicial factfinding." 550 U.S. at 214. The Court explained that the categorical approach "avoid[s] any inquiry into the underlying facts of James' particular offense," and instead "look[s] solely to the elements of attempted burglary as defined by Florida law." *Ibid.* "Such analysis," the Court concluded, "raises no Sixth Amendment issue." *Ibid.* For those same reasons, the court of appeals' application of the categorical approach in this case does not raise any Sixth Amendment issue.

2. In determining whether vehicular flight presents a serious potential risk of physical injury to others, courts properly consider risks created during pursuit or capture

Petitioner argues (Br. 13-14) that courts may not consider potential violence during pursuit or capture in deciding whether vehicular flight qualifies as an ACCA violent felony. That argument is unsound.

a. Petitioner asserts that "[t]he Indiana vehicular fleeing offense is complete when the person fails to stop after a police officer has identified himself and ordered the person to stop." Br. 13. Even if that assertion were correct, the ACCA's text demonstrates that Congress cared about more than just the third-party risk that flows from the initiation of an offense. The injury risked by the enumerated crimes often occurs after they are complete. In many crimes involving use of explosives, for example, any injury to others would occur only once the crimes have already been committed. See, *e.g.*, 18 U.S.C. 2275 ("plac[ing]" bombs or explosives in or upon a vessel with intent to injure the vessel or persons on board); 18 U.S.C. 2332f(a) ("plac[ing]" or "attempt-[ing]" to "place[], discharge[], or detonate[]" an explosive device in a public place). Similarly, arson is complete when a building has been set on fire or burned, see, *e.g.*, 18 U.S.C. 81, but any injury to persons often occurs when the fire subsequently spreads or creates a smoke hazard.

The same is true of the enumerated crimes that are violent and aggressive because the offender consciously commits them despite the risk of a closely related confrontation. In most States, a defendant commits the crime of extortion by making a *threat* with the intent to acquire something of value. See *James*, 550 U.S. at 220

(Scalia, J., dissenting) (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4(a), at 198-199 (2d ed. 2003)); James Lindgren, *Blackmail and Extortion in* 1 *Encyclopedia of Crime and Justice* 102, 104 (Joshua Dressler ed., 2d ed. 2002). That common, contemporary understanding of extortion presumably provides the definition of generic "extortion" under the ACCA. See *Taylor* v. *United States*, 495 U.S. 575, 592-598 (1990). And under that definition, any injury to others would occur after the offense is complete, when the offender decides to carry out the threat that he earlier made.

The potential violent confrontation in burglary also may occur after the offense is complete. The conduct necessary to commit generic burglary is entering or remaining without permission in a building with intent to commit a crime. *Taylor*, 495 U.S. at 598. A violent confrontation between the burglar and an occupant or police officer may often occur only after the defendant is no longer in the building. See, *e.g.*, *United States* v. *Graves*, 60 F.3d 1183, 1184-1185 (6th Cir. 1995) (burglar fled the scene and fired shots at a pursuing officer); Mike Gangloff, *Man Gets Life Sentence In Deadly New Year's Burglary*, Roanoke Times, May 28, 2010, at A9 (burglar fled the scene, shooting and killing the homeowner's friend). Indeed, when the Court assessed the risk posed by attempted burglary in *James*, it expressly considered the risk of violence in a confrontation occurring after the crime is completed. See 550 U.S. at 211 (considering the risk of violence when an officer or homeowner pursues a would-be burglar following an attempted burglary).

A prohibition on considering injuries that occur after commission of the offense also would have no support in the remaining text of the statute. The ACCA's residual

clause refers to the "conduct" "involve[d]" in the offense. 18 U.S.C. 924(e)(2)(B)(ii). But that clause does not require the offense conduct to involve "potential physical injury." Instead, it requires the conduct to involve a "potential risk of physical injury." *Ibid.* Thus, the offense conduct need not itself entail potential injury but need only create a potential *risk* that injury will follow. That conclusion is reinforced by the absence of any language requiring that the injury occur "in the course of committing the offense." Congress included that precise language when defining a "crime of violence" under 18 U.S.C. 16(b). Its decision not to include similar language in the ACCA is fatal to petitioner's position.

A prohibition on considering injuries occurring after commission of the offense likewise would not advance the ACCA's purpose. That purpose is to sentence more harshly career criminals who not only possess firearms but are likely to use them. See *Begay*, 553 U.S. at 146. In assessing whether a defendant's prior offense establishes such a likelihood, it makes sense to consider all harm that may result from the prior offense, so long as the conduct constituting the offense creates a clear risk that the harm will occur. Whether the harm will occur during commission of the prior offense itself or in its immediate aftermath reveals nothing about the offender's willingness to injure others. Indeed, petitioner's proposed limitation would frustrate the ACCA's purpose. It would exclude from the ACCA an obviously violent crime like placing a biological toxin in a mass transportation vehicle with the intent to endanger the safety of another person, 18 U.S.C. 1992(a)(2), because any injury to others would occur only after the toxin had been placed on the vehicle. That cannot be what Congress intended.

b. Even if there were a requirement that the violence risked by a prior offense must occur while the offense is ongoing, potential violence during vehicular flight would satisfy that test. By definition, the offense of vehicular flight is ongoing so long as the offender is fleeing from police. See *Mays* v. *City of E. St. Louis*, 123 F.3d 999, 1004 (7th Cir. 1997) ("[F]light from the police [is] an ongoing crime."). The offender is therefore responsible for the harm that results from his flight. See *United States* v. *McDougal*, 368 Fed. Appx. 648, 655 (6th Cir. 2010) (finding the defendant liable for restitution because "the act of fleeing was ongoing" and "the damage to the police cars was therefore an immediate consequence of such flight").

In that way, vehicular flight is like escape from custody. Both are continuing offenses that encompass conduct likely to occur during the efforts to evade police. See *United States* v. *Martin*, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offense[s], which heighten the emotions and adrenaline levels of the parties involved, and which generally end with a confrontation between the officer and the escapee or fleeing driver.") (internal quotation marks and citations omitted); see also *Bailey*, 444 U.S. at 413 (escape from custody under 18 U.S.C. 751(a) is a continuing offense); *United States* v. *Merino*, 44 F.3d 749, 754 (9th Cir. 1994) (unauthorized flight to avoid prosecution under 18 U.S.C. 1073 is a continuing offense), cert. denied, 514 U.S. 1086 (1995).

In addition to following logically from the nature of the offense, treating vehicular flight as a continuing offense makes sense because the offender poses a continuing threat to society during the entire period that he remains in flight from police. Cf. *Bailey*, 444 U.S. at 413

("Given the continuing threat to society posed by an escaped prisoner, 'the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.'") (quoting *Toussie* v. *United States*, 397 U.S. 112, 115 (1970)). In deciding whether vehicular flight qualifies as a violent felony under the ACCA, it is therefore entirely appropriate to consider all of the risk created by an offender's ongoing effort to elude law enforcement.

Petitioner claims that courts should not consider any violence that occurs after an offender disregards an officer's order to stop, because such violence is not "an intrinsic component of the offense." Br. 14. That claim is essentially a repetition of petitioner's erroneous argument that the only risks to be considered are those that arise from conduct that is an element of the offense. See pp. 34-36, *supra*. For example, violent confrontation is one of the risks posed by burglary, even though violent confrontation is not an "intrinsic component" of the offense of burglary. In this case, the court of appeals correctly recognized that just as it is possible to commit burglary without confronting anyone, it is possible to flee from police by calmly operating the vehicle within speed limits and scrupulously observing all traffic laws. I J.A. 31-32. But that is not the "conduct" "involve[d]" in vehicular flight, 18 U.S.C. 924(e)(2)(B)(ii), "in the ordinary case," *James*, 550 U.S. at 208.

3. Vehicular flight is a violent felony, even if a State elects to create greater or additional offenses that might also be applicable in a given case of vehicular flight

Four courts of appeals (the First, Fifth, Sixth, and Tenth Circuits) have agreed with the Seventh Circuit that intentional flight from a law enforcement officer is

a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Sentencing Guidelines. See *United States* v. *McConnell*, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines), petition for cert. pending, No. 10-6991 (filed Oct. 13, 2010); *Harrimon*, 568 F.3d at 534-537 (ACCA); *LaCasse*, 567 F.3d at 767 (ACCA); *Powell* v. *United States*, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Two courts of appeals (the Eighth and Eleventh), however, have reached a contrary conclusion, each for different reasons. See *United States* v. *Tyler*, 580 F.3d 722, 725 (8th Cir. 2009); *Harrison*, 558 F.3d at 1291. Petitioner discusses (Br. 15) only *Harrison*, but neither decision is consistent with the ACCA and this Court's precedents.

a. In *Tyler*, a divided panel of the Eighth Circuit held that the Minnesota offense of vehicular flight from a law enforcement officer is not a crime of violence under Sentencing Guidelines § 4B1.2(a). See 580 F.3d at 725. The Minnesota statute at issue defined fleeing an officer to include various means of evasion, among them increasing speed, extinguishing headlights or taillights, and refusing to stop the vehicle. *Id.* at 724. The Eighth Circuit reasoned that, because Minnesota has defined fleeing as to include some types of conduct (like extinguishing lights) that are not necessarily violent or aggressive, a violation of the Minnesota statute "do[es] not necessarily translate into a serious potential risk of physical injury." *Id.* at 725. The Eighth Circuit distinguished state statutes—like the Indiana statute at issue here—that do not expressly define fleeing to include nonviolent means of evading law enforcement officers. *Id.* at 726.

The Eighth Circuit's reasoning is flawed. Whether or not a state statute specifies on its face the different ways in which an offender may flee from police, it is possible under generic state flight statutes to flee in a violent manner (*i.e.*, at a high speed or without regard to traffic laws) or in a nonviolent manner (*i.e.*, at a low speed while observing all traffic laws). The question for ACCA purposes is therefore not whether vehicular flight "necessarily translate[s] into a serious potential risk of physical injury" *in every case*. Rather, the question is whether vehicular flight translates into a serious risk of injury *in the typical case*. As the Court explained in *James*, "[o]ne could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to anyone." 550 U.S. at 207. But as the Court noted, the ACCA's residual clause "speaks in terms of a 'potential risk,'" which is an "inherently probabilistic concept[]." *Ibid.* What matters is that in the ordinary case, as in *Tyler* itself and as in this case, the offender potentially endangers others by fleeing at high speeds or disregarding traffic laws.

b. In *Harrison*, the Eleventh Circuit held that the Florida offense of vehicular flight from a law enforcement officer is not a violent felony under the ACCA. 558 F.3d at 1296. As relevant here, the Florida statute at issue creates three separate offenses. The basic offense is the third-degree felony of vehicular flight, *i.e.*, willfully fleeing or attempting to elude an identified officer. See Fla. Stat. Ann. § 316.1935(1) and (2) (West 2006). That offense is elevated to a second-degree felony if, during the course of flight, the offender "[d]rives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property," *id.* § 316.1935(3)(a); and it is elevated to a first-degree

felony if, in addition to either of those things, the offender "causes serious bodily injury or death to another person, including any law enforcement officer involved in pursuing or otherwise attempting to effect a stop," *id.* § 316.1935(3)(b). In *Harrison*, the Eleventh Circuit held that vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. 558 F.3d at 1291, 1295-1296.[9]

i. Petitioner argues (Br. 14-15) that the Indiana statute at issue, Ind. Code § 35-44-3-3, has a similar structure. To understand why petitioner's argument is incorrect, it is important to understand the structure of the Indiana statute. Section 35-44-3-3(a) criminalizes three types of knowing or intentional resistance to police: Subsection (a)(1) prohibits interfering with an officer in the execution of his duties; Subsection (a)(2) prohibits obstructing the service of process or execution of a court order; and Subsection (a)(3) prohibits fleeing from an identified law enforcement officer. Subsection (a)(3) does not specify that the flight must be undertaken through any particular means, and thus it covers both flight on foot and flight in a motor vehicle. All three types of resistance identified in Subsection (a) are Class A misdemeanors under state law, except as provided in Subsection (b) of the statute.

Subsection (b)(1) provides that resisting law enforcement can be elevated to a Class D felony in either of two

[9] Since *Harrison*, the Eleventh Circuit has held that Florida's lesser form of aggravated vehicular flight—which requires driving at high speed or wantonly disregarding the safety of persons or property—is a crime of violence under Section 4B1.2 of the Sentencing Guidelines. *United States* v. *Harris*, 586 F.3d 1283, 1289 (2009), petition for cert. pending, No. 09-10868 (filed May 14, 2010).

ways. First, resisting police is elevated to a Class D felony if "*the offense is described in subsection (a)(3)* and the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A) (emphasis added). In other words, if an offender flees from an identified law enforcement officer and uses a vehicle to commit that flight, the offense is a felony rather than a misdemeanor. Second, resisting police is elevated to a Class D felony if "*while committing any offense in subsection (a)*, the person * * * operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." *Id.* § 35-44-3-3(b)(1)(B) (emphasis added). In other words, if an offender resists police in any of the three statutorily prohibited ways—by interfering with the execution of official duties, obstructing process service or court orders, or fleeing from an identified officer—and in the process endangers another with a vehicle, the offense is a felony.[10]

Relying on *Harrison*, petitioner argues (Br. 14-15) that his vehicular flight conviction is not an ACCA pred-

[10] Subsections (b)(2) and (b)(3) provide that resisting law enforcement can be further elevated to a Class C or a Class B felony if a vehicle is involved and certain harms result. "[I]f, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person," the offense is a Class C felony. Ind. Code § 35-44-3-3(b)(2). And "if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person," the offense is a Class B felony. *Id.* § 35-44-3-3(b)(3). At the time of petitioner's offense, the Indiana statute did not provide that the offense of resisting law enforcement could be elevated to a Class A felony. Resisting law enforcement is currently elevated to a Class A felony "if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of a law enforcement officer while the law enforcement officer is engaged in the officer's official duties." *Id.* § 35-44-3-3(b)(4) (2010).

icate because he was convicted of the first type of Class D felony (*i.e.*, fleeing in a vehicle from an officer) rather than the second type of Class D felony (*i.e.*, resisting law enforcement in a prohibited way and thereby endangering someone with a vehicle). It is simply irrelevant, however, which type of Class D felony the State elected to charge in this particular case. When a defendant flees from police, there are two ways to prove that the offense is a Class D felony under Indiana law: by proving that the defendant fled in a vehicle *or* by proving that the defendant, whatever his means of flight, created a substantial risk of injury to others. It may be the case —indeed, it often is the case—that a defendant who uses a vehicle to flee does both: he flees in a vehicle *and* endangers others along the way using that vehicle. But the State of Indiana need only prove one element or the other to elevate the crime to a felony, and nothing can be inferred from its decision in a given case to prove the means of flight instead of the manner of flight.

For instance, in a case in which both types of Class D felonies could be prosecuted, the State might well elect to prosecute the defendant for vehicular flight, because the two offenses are equally serious and vehicular flight does not require proof to the jury beyond a reasonable doubt that the defendant's conduct in fact endangered others. In addition, prosecutors often negotiate, and courts often accept, pleas to lesser or different charges. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361-362, 363 (1978); *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Thus, neither in this case nor generally is it reasonable to infer that a defendant convicted of vehicular flight probably did not create endanger others. This case is a good example: petitioner's prior conviction for vehicular flight involved driving on

the wrong side of the road, as well as driving through residential yards in which people were standing, before striking the rear of a house. Accordingly, petitioner's conduct doubtless created "a substantial risk of bodily injury" to others, Ind. Code § 35-44-3-3(b)(1)(B), even though petitioner pleaded guilty instead to the offense of vehicular flight.

ii. More generally, petitioner seems to argue (Br. 15) that his flight conviction is not an ACCA predicate because he was not convicted of any offense that has as an element threatened injury, actual injury, or death. That argument confuses the relevant inquiry under the ACCA. The correct inquiry is not whether vehicular flight in a *particular* case creates an *actual risk* of death or injury to third parties (let alone actual death or injury), but whether vehicular flight in a *typical* case creates a *potential risk* of serious harm to others. It is therefore irrelevant that petitioner was not convicted of "creat[ing] a substantial risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B), let alone of causing such injury or even death, *id.* § 35-44-3-3(b)(2) and (3). The question under the ACCA's residual clause is not whether petitioner's particular flight presented an actual and substantial risk to the safety of others. Rather, the question is whether a typical offender's flight presents a "serious potential risk" to others' safety. 18 U.S.C. 924(e)(2)(B)(ii). It would be no defense for petitioner to say that, on the facts of his particular case, that potential risk to third parties never materialized into an actual risk.

Other courts of appeals have recognized that even if vehicular flight does not create an actual risk of death or injury to bystanders or others, it still creates a "serious potential risk" in the typical case. For instance, the

Sixth Circuit held in considering a similar Tennessee state statute that "[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create the actual risk of death or injury that would make it a Class D felony under Tennessee law." *Rogers*, 594 F.3d at 521. The Fifth Circuit likewise noted in *Harrimon* that "while it is possible * * * to be guilty of fleeing by vehicle despite obeying all traffic laws and later surrendering quietly, * * * in the typical case, an offender * * * will not hesitate to endanger others to make good his or her escape." 568 F.3d at 536.

Petitioner speculates (Br. 18 n.5) that a fleeing offender in Indiana who risks or causes harm to others will be convicted of one of the Indiana offenses that requires proof of such risk or harm. But as explained earlier, there are two ways that flight of any kind—whether on foot or in a vehicle—can qualify as a felony under Indiana law: the offender uses a vehicle to flee, Ind. Code § 35-44-3-3(b)(1)(A); or the offender flees and, in the process of flight, operates a vehicle in a way that endangers others, *id.* § 35-44-3-3(b)(1)(B). Both of those offenses are Class D felonies, and neither is more aggravated than the other under state law. Nor is either crime a lesser included offense of the other, so that a defendant's conviction for the lesser offense could even possibly be taken to indicate that he had not committed the greater offense.[11] It is true that Indiana has created

[11] For one offense to be a lesser included offense of another, the lesser offense must be necessarily included in the greater offense, such that it is impossible to commit the greater offense without committing the lesser offense. *Schmuck* v. *United States*, 489 U.S. 705, 716-717 (1989); see *Zachary* v. *State*, 469 N.E. 2d 744, 749 (Ind. 1984) ("A lesser included offense is necessarily included within the greater offense so

Class C and Class B felonies for vehicular flight that actually injures or kills someone. See p. 45 note 10, *supra*. Those harms, however, far outstrip the level of potential risk that must be shown under the ACCA's residual clause, and petitioner does not argue otherwise.

Regardless, in deciding whether an offense qualifies as a violent felony under the ACCA's residual clause, the proper inquiry is into the potential risks typically created by conduct constituting that offense. It is not relevant to that inquiry whether greater or different charges may in some circumstances also be available under state law to punish that conduct. Nor is it relevant that a given defendant may not have been prosecuted on whatever greater or different charges may be available.

This Court's decision in *James* illustrates these principles. In *James*, this Court noted the possibility that either burglary or attempted burglary could result in a "confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Of course, such confrontations could become not only violent but

that it is impossible to commit the greater offense without first having committed the lesser."). That is not true of vehicular flight under Section 35-44-3-3(b)(1)(A) and resistance to law enforcement involving a vehicle and creating a substantial risk of bodily injury under Section 35-44-3-3(b)(1)(B). A defendant can commit the former offense without committing the latter, by fleeing in a way that poses no actual risk to anyone. Conversely, a defendant can commit the latter offense without committing the former, by dangerously using a car not to flee but rather to interfere with an officer's performance of his duties or with the service of process or execution of a court order. Thus, rather than being greater and lesser included offenses, the two types of Class D felonies are simply alternative forms of aggravated resistance to law enforcement.

fatal, in which case the perpetrator's offense could be prosecuted as the much more serious greater offense of felony murder. See generally *Whalen* v. *United States*, 445 U.S. 684 (1980). But that does not mean that the risk of a fatal confrontation must be ignored when considering whether offenses like burglary or attempted burglary present a serious potential risk to others.

Similarly here, in considering the risks presented by the offense of vehicular flight from law enforcement, courts must take into account all instances of vehicular flight from law enforcement, including those that involve circumstances which could lead to prosecution for greater or different offenses. Put another way, a defendant who commits vehicular flight that results in someone else's death is guilty under Indiana law of a greater offense. See Ind. Code § 35-44-3-3(b)(3) (making it a Class B felony, in the course of resisting law enforcement, to "operate[] a vehicle in a manner that causes the death of another person"). But such a defendant also is guilty of the less serious offense of vehicular flight, and the risk that offenders who commit vehicular flight might cause someone else's death must be considered in determining whether vehicular flight from law enforcement is a violent felony under the ACCA.

In any event, even if the risks presented by conduct that could be prosecuted as greater or different offenses were properly disregarded, vehicular flight would remain sufficiently dangerous to qualify as a violent felony. The risk created by vehicular flight includes the risk of physical confrontation when the pursuing officer brings the flight offense to an end. That risk does not arise from the manner in which the perpetrator operates the vehicle, but rather from the circumstance that, in the typical case, the vehicular flight offense ends in a

physical confrontation with the arresting officer. In *James*, the Court indicated that the risk of injury associated with the interruption of an attempted burglary by a police officer or other person would be sufficient to satisfy the ACCA's residual clause. See 550 U.S. at 211-212. Likewise, the risk of injury associated with the termination of the flight offense by the pursuing police officer satisfies the residual clause's risk requirement, without regard to the particular risk presented by the offender's operation of his vehicle.

4. The rule of lenity does not apply

Finally, petitioner is incorrect to suggest (Br. 18 n.6) that the rule of lenity applies here. That rule is reserved for cases that, unlike this one, involve a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he simply disagrees (Br. 18) with the court of appeals' conclusion that an offender's deliberate flight from police creates a "serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The serious-risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous. And, for the reasons discussed above, vehicular flight from police clearly satisfies that standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 924(e) of Title 18, United States Code, provides:

Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

2. Indiana Code § 35-44-3-3 (Supp. 2001) provides:

Resisting law enforcement

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense under subsection (a) is a:

(1) Class D felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

(2) Class C felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person; and

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person.

(c) For purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer and a conservation officer of the department of natural resources.

3. Indiana Code § 35-44-3-3 (Supp. 2010) provides:

Resisting law enforcement

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense under subsection (a) is a:

(1) Class D felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

(2) Class C felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person;

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person; and

(4) Class A felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of a law enforcement officer while the law enforcement officer is engaged in the officer's official duties.

(c) For purposes of this section, a law enforcement officer includes an enforcement officer of the alcohol and tobacco commission and a conservation officer of the department of natural resources.

(d) If a person uses a vehicle to commit a felony offense under subsection (b)(1)(B), (b)(2), (b)(3), or (b)(4), as part of the criminal penalty imposed for the offense, the court shall impose a minimum executed sentence of at least:

(1) thirty (30) days, if the person does not have a prior unrelated conviction under this section;

(2) one hundred eighty (180) days, if the person has one (1) prior unrelated conviction under this section; or

(3) one (1) year, if the person has two (2) or more prior unrelated convictions under this section.

(e) Notwithstanding IC 35-50-2-2 and IC 35-50-3-1, the mandatory minimum sentence imposed under subsection (d) may not be suspended.

(f) If a person is convicted of an offense involving the use of a motor vehicle under:

(1) subsection (b)(1)(A), if the person exceeded the speed limit by at least twenty (20) miles per hour while committing the offense;

(2) subsection (b)(2); or

(3) subsection (b)(3);

the court may notify the bureau of motor vehicles to suspend or revoke the person's driver's license and all certificates of registration and license plates issued or registered in the person's name in accordance with IC 9-30-4-6(b)(3) for the period described in IC 9-30-4-6(d)(4) or IC 9-30-4-6(d)(5). The court shall inform the bureau whether the person has been sentenced to a term of incarceration. At the time of conviction, the court may obtain the person's current driver's license and return the license to the bureau of motor vehicles.

REPLY BRIEF

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No. 09-11311

In The
Supreme Court of the United States

♦

MARCUS SYKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

♦

REPLY BRIEF OF THE PETITIONER

♦

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INTRODUCTION

The Armed Career Criminal Act (hereinafter "ACCA") requires the imposition of a fifteen-year mandatory minimum sentence upon gun possessors who have three previous convictions for a "violent felony." 18 U.S.C. § 924(e)(1) The district court imposed that sentence on Marcus Sykes, concluding that his Indiana conviction for failing to stop his vehicle when ordered was a violent felony. The government argues that the sentence should be affirmed. The principal problem with the government's argument is that it ignores the specific Indiana statute under which Mr. Sykes was convicted. Indiana Code § 35-44-3-3(b)(1)(A) (hereinafter "(b)(1)(A)") makes it a crime for a person to knowingly or intentionally flee in a vehicle after being ordered to stop by a police officer. This statute does not encompass conduct creating a serious potential risk of physical injury to another. A separate Indiana statute, Indiana Code § 35-44-3-3(b)(1)(B) (hereinafter "(b)(1)(B)"), criminalizes vehicular flight in a manner that risks injury. Ignoring the distinctions drawn by the Indiana legislature, the government seeks affirmance not on Mr. Sykes's specific crime, but on its posited generic version of vehicular flight. This generic-offense approach runs counter to the statutory language and this Court's precedents, particularly *Chambers v. United States*, 129 S. Ct. 687 (2009), which require a

focus on the specific crime that the government seeks to characterize as a "violent felony."

The government's unwillingness to accept the crime of conviction is the primary, but not the only, reason that its arguments fail. They also fail because they misread *Begay v. United States*, 553 U.S. 137 (2008) and *Chambers*. *Begay* held that, to qualify as a violent felony under the "otherwise" clause, a crime must be "violent and aggressive." *Chambers* reiterated those requirements. The government, however, insists that *Chambers* allows a conclusion that an offense is violent and aggressive on a mere showing of affirmative conduct that might lead to a confrontation. That assertion is wrong. Further, the government's argument relies on speculation concerning the degree of risk posed by the conduct ordinarily underlying a violation of (b)(1)(A). Finally, acceptance of the government's arguments creates serious Sixth Amendment constitutional concerns which can, and should be, avoided. For all these reasons, the government's arguments must be rejected and Mr. Sykes's sentence must be vacated.

♦

ARGUMENT

A. The Government's Construction of a Generic Vehicular Fleeing Offense Is Contrary to the Statutory Language and to This Court's Teachings That the Particular State Crime of Conviction Is the Focus of § 924(e)'s "Otherwise" Clause.

The government's argument rests on the premise that the issue is whether "vehicular fleeing" as a generic offense is a "violent felony." That premise is flawed. Section 924(e)(2)(B)(ii)'s language looks not to a generic offense, but to the particular "crime." In *Chambers,* the Court gave effect to that plain language when it rejected the government's notion that all escapes are created equal. The proper application of the "otherwise" clause, the Court explained, was to look not at a general, generically defined "escape" offense, but to look at the particular statute under which the defendant had been convicted, its wording, and "the nature of the behavior that likely underlies a statutory phrase." *Chambers,* 129 S. Ct. at 690. The government appears not to have heeded that explanation. Its brief posits a generic vehicular fleeing offense, rather than focusing on the elements of the Indiana statute Mr. Sykes was convicted of violating.

In part, the government's error appears to arise from its confusion about the two distinct analyses that apply to the two distinct definitions set out in § 924(e)(2)(B)(ii). A "violent felony" is "any crime punishable by imprisonment for a term exceeding one year . . . that – (ii) is burglary, arson, extortion, involves

the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). A "crime" may be a violent felony either because it "is" an enumerated offense, or because it presents a risk similar to the risks posed by the enumerated offenses.

When a defendant's prior conviction is asserted to be for one of the enumerated offenses, the question is whether the legislatively defined "crime" of which the defendant was convicted "is burglary, arson, extortion, or involves the use of explosives." The "is" question asks whether the crime of conviction shares the essential characteristics of the enumerated offense. For that question to be answerable, the essence of the enumerated offense had to be delineated.

In its opinion in *Taylor v. United States*, 495 U.S. 575 (1990), the Court established the approach to be used to analyze whether a state crime of burglary is the enumerated offense of "burglary" under the ACCA, and it provided a uniform generic definition of burglary "independent of the labels employed by various States' criminal codes." 495 U.S. at 592. This ensured a consistent definition of a crime that Congress specifically selected for inclusion as a "violent felony."

For offenses asserted to be under the "otherwise" clause, however, the question is not whether the crime "is" a particularly enumerated offense. Instead, the question is whether the crime is similar to the enumerated offenses both in kind and in the degree of

risk posed. *Begay*, 553 U.S. at 143. In making these determinations, the analysis focuses explicitly on the state's definition of the crime, not on a generic offense. *Chambers*, 129 S. Ct. at 690-91; *cf. Johnson v. United States*, 130 S. Ct. 1265, 1269 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)."). Thus the elements of the state statute, as defined by the state's courts, determine the way in which the crime is "ordinarily committed." *Chambers*, 129 S. Ct. at 691 (breaking down Illinois statute into separate elements for purpose of identifying relevant crime); *Begay*, 553 U.S. at 141 (quoting New Mexico's DUI statute for the purpose of identifying the relevant crime); *James v. United States*, 550 U.S. 192, 197 (2007) ("The question before the Court, then, is whether attempted burglary, as defined by Florida law, falls within the ACCA's residual provision . . . ").[1]

As discussed in Mr. Sykes's opening brief, Pet. Br. 10, the elements of the Indiana statute under which Mr. Sykes was convicted are that a person: 1) knowingly or intentionally; 2) fled from a law enforcement officer after the officer identified himself and ordered

[1] In describing the "typical" or "ordinary" case, and in asking this Court to hold that vehicular fleeing constitutes a "violent felony," the government appears to ask for a general advisory opinion concerning *all* vehicular fleeing offenses rather than address the narrower issue presented in this case involving Indiana Code § 35-44-3-3(b)(1)(A).

him to stop; and 3) used a vehicle in fleeing.[2] *See Woodward v. State*, 770 N.E.2d 897 (Ind. App. 2002) (noting that violation of (b)(1)(A) requires nothing more than failure to stop). These elements and the offense they define, and the Indiana statutory scheme addressing vehicular fleeing in which they exist, are what must be considered in assessing whether Mr. Sykes has been convicted of a violent felony. *See Chambers*, 129 S. Ct. 691 (recognizing that state statute set out different types of offenses and declining to treat them all the same under generic "escape" rubric). The statute defining Mr. Sykes's crime treats non-risky flight conduct differently from flight conduct that creates risk to another. As was true in *Chambers*, the government's approach offends the state legislature's differing treatment of the defined crime and the plain language of § 924(e)(2)(B). Like failure to report, simple vehicular flight as defined in (b)(1)(A) is not a violent felony.

B. The Specific Indiana Crime of Which Mr. Sykes Was Convicted Is Not a Violent Felony, Despite the Government's Effort to Subsume the Crime Into a More Serious Offense.

Chambers explained that, for purposes of the "otherwise" clause of the ACCA, it is necessary to look at the particular prior crime of conviction. Escape, a

[2] "Vehicle" is defined by Indiana statute to include any device for transportation by land, water, or air. Ind. Code § 35-41-1-28.

general term, was insufficient to allow a court to discern whether a particular escape crime was a violent felony. The same is true for offenses involving vehicular flight. The Eleventh Circuit recognized this in *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). The *Harrison* court concluded that, like the crime of "escape," all vehicular fleeing offenses should not be treated equally, "especially where the [state] statute differentiates between types of willful fleeing." *Id.* at 1294.[3]

Like the escape statute in *Chambers* that contained various forms of escape conduct, Indiana Code § 35-44-3-3 describes different kinds of vehicular flight that must be separated for ACCA purposes. Mr. Sykes was convicted of violating Indiana Code § 35-44-3-3(b)(1)(A): knowingly or intentionally using a vehicle to flee from a law enforcement officer. Other types of vehicular fleeing proscribed under Indiana Code § 35-44-3-3 include flight resulting in death or injury or creating a substantial risk of injury as elements. The "ordinary conduct" underlying these latter offenses may well qualify them as violent felonies, but the "ordinary conduct" encompassed by the elements set forth in (b)(1)(A), Mr. Sykes's offense,

[3] The Eleventh Circuit has since held that conduct underlying another form of vehicular flight under Florida law that includes the elements of either driving at high speed or wantonly disregarding the safety of other persons is a crime of violence under U.S.S.G. § 4B1.2. *United States v. Harris*, 586 F.3d 1283 (11th Cir. 2009), *petition for cert. pending*, No. 09-10868 (filed May 14, 2010).

does not qualify as a predicate offense under the "otherwise" clause of the ACCA.

The government repeatedly disregards the importance of the distinction chosen by the Indiana General Assembly to differentiate between types of vehicular flight. It attempts to justify its disregard by contending that (b)(1)(A) (simple vehicular flight) and (b)(1)(B) (vehicular flight risking serious bodily injury) are "simply alternative forms of aggravated resistance to law enforcement" and that "neither is a lesser included offense of the other." Gov't Br. 48-49 & n.11. The government's contention, however, is simply in error under this Court's well established rule in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." While some (b)(1)(B) flight offenses may not include (b)(1)(A) as a lesser included offense, vehicular flight necessarily does.

Subsections (b)(1)(A) and (b)(1)(B) both enhance the penalty for fleeing from a law enforcement officer in violation of Indiana Code § 35-44-3-3(a)(3). In addition to the fleeing prohibited by (a)(3), the state can establish the violation of (b)(1)(A) by proving a single additional fact: that the person used a vehicle. To establish a violation of (b)(1)(B), the state must prove two additional facts: (1) that the defendant

operated a vehicle, and (2) that he did so in a manner that "create[d] a substantial risk of bodily injury to another person."[4] If the position of the government were correct, a single act of fleeing in a vehicle could result in consecutive sentences under both statutes, but that would violate the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. *See generally Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).[5]

[4] It is conceivable that a person could "use" a vehicle without "operating" it but the converse is not true. Proof that the person "operated" the vehicle would prove the use element of (b)(1)(A). Thus, the use/operate terminology does not create an element in (A) that is not found in (B).

[5] Nor do the cases cited by the government support the assertion that (b)(1)(A) is not a lesser included offense of (b)(1)(B). Gov't Br. 48-49 n.11. In *Zachary v. State*, 469 N.E.2d 744 (Ind. 1984), the Indiana Supreme Court upheld consecutive sentences for rape and criminal deviate conduct for a defendant who forced a woman to have intercourse and perform fellatio during a single incident. In a single paragraph of the opinion the court rejected the argument that criminal deviate conduct was a lesser included offense of rape because "the two offenses each require proof of one element which the other offense does not." *Id.* at 749.

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court held that a defendant indicted for mail fraud in a scheme to defraud that included rolling back the odometers on used cars was not entitled to a lesser included offense instruction pursuant to Fed. R. Crim. P. 31(c)(1). This rule provides that a defendant may be found guilty of "an offense necessarily included in the offense charged." The Court held that odometer tampering is not "necessarily included" in a charge of mail fraud. In contrast, Ind. Code § 35-44-3-3(b)(1)(A) is necessarily included in (b)(1)(B), so if Rule 31(c)(1) were applicable in Indiana courts it would

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In sum, focusing on the specific statutory provision under which Mr. Sykes was convicted and applying the proper analysis to that provision shows that his previous conviction under (b)(1)(A) does not qualify as a predicate offense under the "otherwise" clause of the ACCA.

C. The Government's Argument Converts *Begay*'s Requirements of "Violent and Aggressive" Conduct to Mere Active and Deliberate Conduct.

Begay made clear that, under the "otherwise" clause, a crime must be similar in kind to the enumerated offenses. 553 U.S. at 143. Similarity in kind means that the crime must, like the enumerated offenses, be purposeful, violent, and aggressive. *Id.* at 144-45.[6] The government maintains that Mr. Sykes's

entitle a defendant charged with violating (b)(1)(B) to an instruction on the necessarily included offense of (b)(1)(A).

[6] This Court has not provided a precise definition of "purposeful" as the term is used in *Begay* However, as noted in Petitioner's opening brief, Mr Sykes concedes that a violation of subsection (b)(1)(A) may be considered "purposeful" to the extent that it requires knowledge or intent. Pet. Br. 11. Contrary to the government's assertion that Mr. Sykes is advocating a new test for "purposefulness" that would require a showing that the offense intrinsically involve "trying to harm a person's person or property," Gov't Br. 26 n.7, Mr. Sykes does not contend that such a showing is necessary under existing precedent. Rather, Mr. Sykes cited Circuit Judge Richard Posner's position simply for this Court's consideration. *See Welch v. United States*, 604 F.3d 408, 434 (7th Cir. 2010) (Posner, dissenting)

crime of conviction is an aggressive offense because all forms of vehicular flight involve affirmative conduct, not mere inaction like the failure to report crime at issue in *Chambers*. It contends that vehicular fleeing is violent because it occurs in the presence of police, thus constituting a clear challenge to an officer's authority and creating a risk of violent confrontation. Gov't Br. 27-31. These arguments misread the requirements of *Begay* and *Chambers*.

A crime is not aggressive simply because it involves active, deliberate conduct. *Begay* itself involved active and deliberate conduct – drinking to intoxication. *Chambers* did not alter *Begay*'s aggressiveness requirement. It held only that the passivity and inaction involved in a failure to report was not aggressive. It did not hold that an offense was aggressive if it involved any sort of affirmative action. *See Chambers*, 129 S. Ct. at 692. In this case, the specific proscribed conduct – a simple failure to stop a vehicle – is similarly unaggressive. "[A]ggressive may be defined as 'tending toward or exhibiting aggression,' which in turn is defined as 'a forceful action or procedure (as an unprovoked attack) esp[ecially] when intended to dominate or master.'" *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) quoting Merriam-Webster's Collegiate Dictionary 24 (11th ed.2003). Leaving an order to stop unheeded and continuing to drive a car may be an affirmative act of disregard, but it is not a forceful action intended to dominate or master. Some crimes of vehicular fleeing may possibly be considered aggressive

depending on what is required by the statute that defines them, but the Indiana offense defined by (b)(1)(A) is not an aggressive offense.

Nor is the offense violent, contrary to the government's contention that a failure to stop creates a risk of confrontation sufficient to make the offense violent. The risk of confrontation in a case involving (b)(1)(A) is low when the fleeing driver is not operating the vehicle in a manner that creates a substantial risk of bodily injury to another. As the *Harrison* court noted, "a disobedient driver's failure to accelerate to a high rate of speed or to drive recklessly signals a different type of criminal and suggests an unwillingness to engage in violent conduct." 558 F.3d at 1295; *cf. United States v. Mosley*, 575 F.3d 603, 607 (6th Cir. 2009) (defendant's "knowing failure to comply with a lawful command – say, by refusing to produce information, by ignoring an officer's command not to cross the street or by failing to stay put at an accident scene – is no more aggressive and violent than walking away from custody, [citing *United States v. Ford*, 560 F.3d 420, 423 (6th Cir. 2009)], drunk driving, *Begay*, 128 S. Ct. at 1588, or a failure to report to prison, *Chambers*, 129 S. Ct. at 691-93.").

The government wrongly invokes *James v. United States,* 550 U.S. 192 (2007), to claim that the possibility of third-party encounters establishes that (b)(1)(A) involves "violent" conduct. Gov't Br. 29-30. The *James* opinion "considered only matters of degree, *i.e.*, whether the amount of risk posed by attempted burglary was comparable to the amount of

risk posed by the example crime of burglary. . . ." *Begay,* 553 U.S. 137, 142 (2008). After *James,* this Court established in *Begay* that predicate felonies must also manifest the same "type" of "purposeful, 'violent,' and 'aggressive' conduct" exemplified by the enumerated felonies. *Id.* at 145. The "violent" nature of burglary stems not from the risk of encountering an outsider, but from its generic elements requiring "unlawful or unprivileged entry into a building or other structure with [the] 'intent to commit a crime.'" *Id.* (citing *Taylor v. United States*, 495 U.S. 595, 598 (1990)). That the mere possibility that a motorist who fails to heed an officer's direction may be said to have had an encounter, or may have an encounter with an officer when the motorist eventually stops, fails to rise to a level of violence akin to a burglar's commitment to perpetrating more crime after an illegal entry. Indiana's non-violent vehicular flight lacks violent and aggressive conduct by legislative design. Violence and aggression may not be read into them by government speculation about things that may happen outside of the conduct encompassed by the elements of the crime of conviction.

Although *Begay*'s "purposeful, violent, and aggressive" test is used to determine whether an offense is similar in kind to the enumerated crimes, ultimately the question remains whether the crime is a "violent felony." The government's argument that Mr. Sykes's fleeing conviction was "violent," and therefore satisfies that aspect of the *Begay* test, is inconsistent with this Court's definition: "[e]ven by

itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. . . . When the adjective 'violent' is attached to the noun 'felony' its connotation of strong physical force is even clearer." *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). Violence is not a speculative matter under the ACCA. It is either threatened or attempted and actualized. The elements of (b)(1)(A) do not involve any degree of force, let alone a "substantial degree of force" or a "strong physical force." The government's speculation does not change that.

Finally, the government, like the Seventh Circuit, relies on a study entitled "Firearm Use by Offenders," a survey of inmates in state and federal correctional facilities,[7] as evidence that "[a]n individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest." *Welch v. United States*, 604 F.3d 408, 425 (7th Cir. 2010) (quoting *United States v. Spells* 537 F.3d 743, 752 (7th Cir. 2008); Gov't Br. 32 (quoting *Welch*). This is mere conjecture, cloaked in a study that does not touch upon the relevant question.

[7] Caroline Wolf Harlow, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, Bureau of Justice Statistics 11 (Nov. 2001), available at http://www.ojp.usdoj.gov/content/pub/pdf/fuo.pdf.

The survey was based on interviews of state and federal prison inmates in 1997, and was not limited to persons "convicted for brandishing or displaying a firearm" as suggested both by the government and by the Seventh Circuit in *Spells*. Thus, the analysis of the statistics in the *Spells* opinion and the government's brief includes inmates serving sentences for violent crimes in which the use of a gun is an integral part of the crime such as murder, armed robbery, and assault with a deadly weapon.

The analysis in the study cited by the Seventh Circuit and the government was of inmates who had used a gun during their offense.[8] The study found that 80.2% of state prison inmates and 48.6% of federal inmates who possessed a gun during the commission of their crime used the gun in some way; of those who had used a gun during their offense, 18.9% of state inmates and 11.6% of federal inmates used the gun to "get away." Wolf Harlow, *supra* at 11, Table 14. The Seventh Circuit erroneously concluded that this study demonstrates a "link between using a vehicle to flee an officer, and that same individual's likelihood of using a gun when fleeing in the future." *Spells*, 537 F.3d at 752.

[8] Of the inmates surveyed, "an estimated 18% of the State prison inmates and 15% of the Federal prison inmates reported using, carrying, or possessing a firearm during the crime for which they were sentenced." Wolf Harlow, *supra* at 1.

The survey did not collect data regarding whether the person surveyed had a previous conviction for any variety of vehicular fleeing, let alone the low-risk vehicular fleeing as defined by (b)(1)(A), so none of the analysis in the survey includes that variable. Without it, the survey cannot support any assertion that there is a correlation between vehicular fleeing and using a firearm at some future time to harm another person. The Seventh Circuit's claim of a "link" is therefore incorrect. There is no link; there is only a leap by the Seventh Circuit from actual data on one subject to a speculative conclusion on an entirely different subject.

The government does not claim a "link." Instead, it uses the data as empirical veneer for its assertion that "[i]n the same way that a firearm can facilitate escape, so too can a motor vehicle. . . ." Gov't Br. 32. This is inaccurate and inapposite. It is inaccurate because a gun and a motor vehicle are very different in nature and thus do not facilitate fleeing in the same way. Brandishing a gun to "get away" is an inherently aggressive action threatening violence; driving away from a law enforcement officer is not. It is inapposite because the question is not whether driving away can facilitate an escape, it is whether driving away is indicative of a person likely to use a gun in the future. The study says nothing about that question. It does not bear in any way on the likelihood that a person convicted of vehicular flight, as defined in Indiana Code § 35-44-3-3(b)(1)(A), "later

possessing a gun, will use that gun deliberately to harm a victim." *Begay*, 553 U.S. at 145.

The Court should reject the government's attempt to reduce *Begay*'s "purposeful, violent and aggressive" requirements to mere active and deliberate conduct.

D. The Government's Argument Casts the Net of Potential Risk of Harm Far More Broadly Than Is Justified by the Particular Offense at Issue in This Case.

In its brief, the government portrays the potential risk of harm from simple vehicular flight as comparable in degree to the risk created by ACCA's enumerated crimes. Gov't Br. 9. The problem with the government's argument is that it casts the net of potential risk of harm far more broadly than is justified by the particular offense at issue in this case. The cast is too broad both because of the government's speculation regarding the risk of confrontation escalating to violence and because the government relies on statistics that do not apply to Mr. Sykes's offense of conviction.

1. Risk of Confrontation Escalating to Violence.

In *James*, decided two years before *Chambers*, this Court observed that the main risk associated with attempted burglary is the potential for a face-to-face confrontation between the burglar and a third

party. *James*, 550 U.S. at 203. But *James* does not stand for the sweeping proposition that a risk of confrontation between an offender and a third party, by itself, renders any crime similar in risk to the enumerated offenses.

Indeed, any activity that brings citizens and police into contact, whether it be a *Terry* stop, a routine traffic stop, or an arrest pursuant to a warrant, carries a risk of confrontation that could escalate to violence. Yet immediate encounters between police and citizens, even those that occur following commission of an offense, do not necessarily present a risk comparable to the risks presented by the offenses enumerated in the ACCA. *See, e.g., United States v. Hopkins*, 577 F.3d 507, 514 (3d Cir. 2009) (crime of unlawfully removing oneself from arrest not a crime of violence; although "typical commission" of crime "does, indeed, present some potential risk of physical injury to another because it requires the arresting officer to use some degree of force to overcome the offender's behavior . . . . we would expect that the force with which the officer would be willing and/or required to employ would present materially less of a potential for physical injury to the officer than the potential for physical injury presented by the enumerated offenses"); *United States v. Mosley*, 575 F.3d 603, 607 (6th Cir. 2009) (prior conviction for resisting and obstructing police officer not crime of violence, as offense does not entail the same degree of risk of physical injury to other individuals as enumerated offenses). The risk of confrontation with an offender possessing an intent to commit a felony offense after

entering into a dwelling is significantly greater than any risk associated with an encounter by police with a driver who makes the spontaneous yet deliberate decision to disregard a police officer's order to stop. *See Harrison,* 558 F.3d at 1294 ("Indeed, the fact that the behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on – but without high speed or recklessness – makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer.").

The primary focus of the risk analysis is on the ordinary conduct underlying the offense itself, not merely the actions that others may take in response to the offender's behavior. In *Chambers*, this Court reserved the question of how much weight to accord to a possible response by law enforcement, finding that "even if we assume for argument's sake the relevance of violence that may occur long after an offender fails to report," the statistical evidence presented by the government in that case did not support a claim that the state crime created a serious risk of physical injury. 129 S. Ct. at 612. This Court's reservation in *Chambers* reflects an understandable hesitation in casting the net of potential risk of injury too wide, particularly given that the rest of the ACCA statutory definition of "violent felony" includes only a limited range of crimes that are themselves violent. To accept the government's argument that any encounter that may be speculated into a less-than-civil ending makes a crime a "violent felony" expands the

definition beyond what Congress intended or what the language it chose permits.

2. The Government's Statistical Evidence.

Contrary to the government's suggestion, Gov't Br. 16, Mr. Sykes does not contend that the government is required to present statistical evidence whenever a defendant disputes whether a prior conviction falls within the "otherwise" clause. However, statistical evidence can be crucial when the predicate crime's link to risk of physical injury is not obvious. For cases about which there is not widespread agreement regarding the potential risk created by the conduct constituting a violation of the statute, the use of "experience and common sense," Gov't Br. 16, as a standard does not give courts, advocates, and defendants an acceptable level of predictability as to whether a particular offense is a "violent felony." Relying on common sense, as the government advocates, is no different from the conjecture Circuit Judge Richard Posner described as an "embarrassment to the law." *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007), *rev'd*, 129 S. Ct. 687 (2009). Like the failure to report crime in *Chambers*, the existing circuit split on the issue presented here demonstrates that reasonable judges can reach conflicting conclusions based on their "experience and common sense." Considering the extraordinarily lengthy prison terms at stake in ACCA cases, empirical data takes on added significance.

The government's speculation that the "ordinary conduct" underlying (b)(1)(A) entails "a serious potential risk of a violent confrontation" is just that – speculation. Mr. Sykes would acknowledge that violence and mayhem can erupt during Hollywood-style high-speed chases, and that such conduct may place the safety of law enforcement officers, motorists, and pedestrians in danger. But that fact tells us nothing about the risk associated with the conduct underlying a violation of Indiana Code § 35-44-3-3(b)(1)(A). The data provided by the government here, which includes anecdotal examples from case law and media reports as well as statistics, are all based on conduct that goes beyond what is encompassed by the elements defining (b)(1)(A). The government's data sheds no light whatsoever on the degree of risk associated with the "typical case" when the only criminal conduct is a failure to stop driving when commanded to do so by police.

In sum, there is no empirical data that Mr. Sykes's previous conviction was for a crime that creates a serious potential risk of physical injury to another. Moreover, reliance by the federal judiciary on data such as what the government has presented here to override the statutory structure established by a state would be a serious affront to federalism and would create even greater uncertainty than currently exists regarding the meaning of a "previous conviction . . . for a violent felony." The Indiana General Assembly has distinguished between those vehicular fleeing cases that "create[ ] a substantial

risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B) and those that do not, Ind. Code § 35-44-3-3(b)(1)(A).[9] In the face of this careful delineation the government asks the Court to reject this categorization and hold that all vehicular flight "creates a substantial risk of bodily injury to another."

James, *Begay*, and *Chambers* all respect the statutory structure created by a state and the interpretations of the state statutes by its courts. There is no reason for the Court to deviate from that principle here. The structure the Indiana General Assembly has created for vehicular fleeing cases defines punishment in a manner that would treat similar cases similarly and establishes a reasonable, logical method for increasing the punishment as the conduct of the offender becomes more egregious.

E. Sixth Amendment and Constitutional Avoidance.

The government's overall approach and its disregard for the statutory distinctions drawn by the Indiana General Assembly reignite Sixth Amendment

[9] The Seventh Circuit has said that an attempt to distinguish between "substantial risk," the language used in (b)(1)(B), and "serious potential risk," the language of the "otherwise" clause, is "a semantic quibble." *United States v. Jennings*, 544 F.3d 815, 820 (7th Cir. 2008).

concerns. This Court held in *James* that the categorical approach established by *Taylor* does not violate the Sixth Amendment because the question of whether a crime is a "violent felony" is decided by looking solely to the elements of the offense as defined by state law. 550 U.S. at 214-15. Reliance by the Court on the statistical data and anecdotal evidence in the government's brief would go beyond the elements of Mr. Sykes's previous conviction under Indiana Code § 44-33-3-3(b)(1)(A) and blend the five categories of vehicular fleeing created by the Indiana General Assembly into one crime of vehicular fleeing. This would create a serious constitutional question as to whether this new method for defining "violent felony" violates the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

As discussed above, one of the categories created by the Indiana General Assembly is (b)(1)(B), which is distinguished from (b)(1)(A) only by the additional element of "creat[ing] a substantial risk of bodily injury to another person." In holding that Mr. Sykes's violation of (b)(1)(A) "presents a serious potential risk of physical injury to another," the district court and the Seventh Circuit made a judicial finding of an element of the offense that was not included in Mr. Sykes's previous conviction. The serious constitutional question raised by this decision can be avoided by rejecting the government's position, by following the precedents of *James*, *Begay*, and *Chambers*, and by holding that the offense defined by (b)(1)(A) is not a "violent felony."

F. The Rule of Lenity.

The government argues against application of the rule of lenity, asserting that "[t]he serious risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous." Gov't Br. 51. But members of this Court have disagreed. *Chambers*, 129 S. Ct. at 694 (Alito, J., and Thomas, J., concurring) (emphasizing "that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us"); *Begay*, 553 U.S. at 155 (Alito, J., dissenting) (stating that "the so-called 'residual clause' of [the ACCA] calls out for legislative clarification"); *James*, 550 U.S. at 216 (Scalia, J., dissenting) (stating that the boundaries of the ACCA's "residual provision" is "ill-defined"). Given the inconsistency among the circuits following their "careful examination" of the issue as to whether simple vehicular fleeing constitutes a violent felony, one is left to conclude that the "otherwise" clause constitutes a grievous ambiguity warranting application for the rule of lenity and an interpretation of the statute in Mr. Sykes's favor.

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CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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